Diamond Walnut Growers, Inc. *and* Cannery Workers, Processors, Warehousemen & Helpers Local 601, International Brotherhood of Teamsters AFL–CIO. Cases 32–CA–17353, 32–CA–17449, and 32–CA–17938

November 28, 2003

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER AND WALSH

On September 24, 2001, Administrative Law Judge James M. Kennedy issued the attached decision. The General Counsel filed exceptions and a supporting brief. The Respondent filed an answering brief, cross-exceptions, and a supporting brief. The General Counsel filed an answering brief to the Respondent's cross-exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions, cross-exceptions, and briefs and has decided to affirm the judge's rulings, findings, and conclusions as modified below and to adopt the recommended Order as modified below.[1]

Introduction

The primary issues presented by the parties' exceptions are whether the Respondent violated Section 8(a)(3) and (1) of Act by: (1) failing to reinstate former economic strikers; and (2) failing to offer former economic strikers available positions which were not substantially equivalent to their prestrike jobs. We agree with the judge that the Respondent violated the Act by failing to reinstate former strikers Rosa Elena Juarez and Willie Smith.[2] We also agree with the judge that the Respondent did not violate the Act by failing to reinstate and/or offer nonequivalent employment to former strikers Mari Ledezma, Elpidia Pina, Mariano Tobin, Virginia Galabis, Amanda Gomez (Sigman), Chiu Mar, Joel Perez, Hector Rosas, Maria Ruiz, Florentina Zuniga, Maria Estrada, Marissa Maria Martinez, Horacio Ramirez, Alfredo Rodriquez, Maria Romero, Maria L. Martinez Vallejo, Maldera Gidion, Rachel Pacheco (Peralta), Ramlal Singh, Linda Acevedo, Socorro Garcia, John Gonzalez, Alfonsina (Margret) Munoz, Estella Curiel, and Gregorio Correa.[3] Contrary to the judge, however, we also find that the Respondent did not violate the Act by failing to reinstate and/or offer nonequivalent employment to former strikers Regina Herbert and Art Torres.

1. The Union's offer to return to work

As a preliminary matter, we address the judge's finding that certain of the Union's offers on behalf of striking employees to return to work were not unconditional. The offers were contained in a series of letters, the earliest of which was dated August 9, 1999. The letters state either "(the named employees) have decided to make an unconditional offer to return to work immediately" or "(the named employees) would like to return to work." At various points in his decision, the judge found that the offers were not unconditional because they were precatory, i.e., they indicate that the named employees have decided to make an offer to return to work but do not actually go on to make the offer. We disagree.

The Union's letters are specific, unequivocal, and do not impose any conditions on the strikers' return to work. Although some of the offers do not expressly state that they are unconditional, an offer to return to work does not have to use the word "unconditional" in order to be valid. Concededly, some of the letters simply stated that the employee would "like to return to work." However, this language is tantamount to an offer to return to work, and there are no conditions attached to the offer. See, e.g., *SKS Die Casting*, 294 NLRB 372 (1989), affd. in relevant part 941 F.2d 984 (9th Cir. 1991) (statement that "The Union is willing to . . . have our members return to work" held to be a valid unconditional offer to return to work). Accordingly, we reverse the judge and find that the Union's letters constituted valid unconditional offers to return to work.

2. Failure to offer former strikers nonequivalent positions

In adopting the judge's conclusion that the Respondent did not violate the Act by failing to offer former strikers nonequivalent positions, we specifically affirm his finding that the Respondent was not obligated to notify former strikers when it placed such positions up for bid pursuant to an internal job posting system. Thus, for the

[1] We shall modify the judge's recommend Order to reflect our findings set forth below. In addition, we shall modify the recommended Order to require that the Respondent rescind its unlawful no-distribution rule and notify its employees in writing that it has done so. We shall also substitute a new notice in accordance with our recent decision in *Ishikawa Gasket America, Inc.*, 337 NLRB 175 (2001).

[2] For the reasons set forth below, however, we find that Smith is only entitled to backpay for a period of 6 weeks.

[3] No exceptions were filed to the judge's findings that the Respondent did not unlawfully fail to reinstate or offer nonequivalent employment to Ledezma, Pina, Tobin, Galabis, Perez, Rosas, Zuniga, Estrada, Martinez, Ramirez, Rodriguez, Romero, Pacheco, and Munoz.

reasons set forth below, we find no merit in the General Counsel's contention that the judge's finding in this regard is inconsistent with Board precedent and should be reversed.

The relevant facts, more fully set forth in the judge's decision, are as follows. The Respondent fills job openings through a bid procedure in which jobs are posted on a company bulletin board. The Respondent places two types of jobs up for bid: regular and seasonal bid jobs. Regular jobs are full-time year-around positions. Seasonal bid jobs are temporary, lasting only during the 2 to 3 month walnut harvest season.

The Respondent controls access to the plant through the use of guarded gates. Only persons with current company-issued badges or those who make prior arrangements with the Respondent are permitted to enter the gates. On many occasions, former strikers and union officers have requested, and were granted, access to the plant.

The Respondent placed a number of regular and seasonal jobs up for bid after strikers tendered unconditional offers to return to work. It is undisputed that the Respondent did not inform any unreinstated former strikers of the postings. The General Counsel contends that, by failing to inform unreinstated former strikers of the postings while at the same time allegedly restricting access to the plant, the Respondent effectively prohibited them from bidding on the positions. This, the General Counsel contends, amounted to discrimination on the basis of their former-striker status, in violation of Section 8(a)(3) and (1). In support, the General Counsel cites *Medite of New Mexico, Inc.*, 314 NLRB 1145 (1994), enfd. 72 F.3d 780 (10th Cir. 1995) (employer violated Section 8(a)(3) by failing to give former strikers the opportunity to bid on posted vacancies). The General Counsel contends that the Board's holding in *Medite* compels us to find that the Respondent's failure to notify unreinstated former strikers of the job postings violated the Act. We disagree.

This case differs from *Medite* in several important respects. First, in *Medite*, the Board found that the employer's plant manager had issued specific instructions to deny unreinstated strikers access to the plant. Here, in contrast, there is no evidence that the Respondent ever denied unreinstated strikers access to the plant. Rather, as stated above, the record reflects that the Respondent permitted them access on many occasions. Indeed, the record does not even show that any former striker ever requested access to the plant for the purpose of viewing job postings. Further, there is no evidence indicating that the Respondent would have denied such a request.

Second, nearly all of the job postings at issue in this case were for seasonal bid jobs. As found by the judge, the Respondent fills seasonal bid jobs only with incumbent regular employees. This is because when an incumbent regular employee fills a seasonal bid job, the employee retains both the seasonal bid job and his regular job. When the season ends, the employee returns to his regular job. Hence, the award of a seasonal bid job to an incumbent regular employee does not result in the expansion of the Respondent's regular work force—as would the award of a seasonal bid job to an unreinstated striker. Accordingly, unlike in *Medite*, most of the postings at issue here did not represent actual vacancies. Therefore, the Respondent could lawfully restrict bidding on such postings to incumbent regular employees.[4]

Finally, there is no legal requirement that an employer apprise strikers of nonequivalent jobs, and no legal obligation to allow strikers to bid on same. There is only the legal requirement not to treat strikers discriminatorily because they are strikers. Compare *Medite*, where the employer treated strikers discriminatorily by failing to give them the opportunity to bid on nonequivalent jobs while permitting nonstrikers to do so. There is no such discrimination here.

3. Regina Herbert

The judge found that the Respondent violated Section 8(a)(3) of the Act by failing to offer Regina Herbert a seasonal lift truck operator position that it placed up for bid. We disagree.

Regina Herbert was a full-time regular employee assigned to drive a forklift at the time of the strike. It is undisputed on the record that no vacancies occurred in Herbert's prestrike job or in substantially equivalent positions. However, after Herbert submitted an unconditional offer to return to work, the Respondent posted several seasonal bid lift truck operator positions. The lift truck operator position is similar to that of forklift driver.

As we have previously found, unreinstated former strikers were not entitled to be considered for seasonal bid jobs, because they do not represent actual vacancies. The Respondent does not add to its regular workforce when it awards a seasonal bid. It merely shifts its workforce around to accommodate its changing needs during the 2 to 3 month walnut harvest. Accordingly, we find, contrary to the judge, that the Respondent did not violate the Act by failing to offer Herbert a seasonal bid job as a lift truck operator.

[4] See *Textron, Inc.*, 257 NLRB 1, 4 (1981), affd. in relevant part 687 F.3d 1240, 1243–1244 (8th Cir. 1982), cert. denied 461 U.S. 914 (1983). See also *Oregon Steel Mills*, 291 NLRB 185, 191–192 (1988), enfd. 134 LRRM 2432 (9th Cir. 1989), cert. denied 496 U.S. 925 (1990) and cases cited therein.

4. Art Torres

Art Torres was a lead maintenance mechanic when the strike began. It is undisputed on the record that no lead maintenance mechanic positions became available. The judge found, however, that a packaging machine mechanic position that the Respondent placed up for bid after Torres submitted an unconditional offer to return to work was substantially equivalent to Torres' prestrike position. The judge based this finding on the fact that Torres' prestrike duties included working as a packaging machine mechanic and supervising others performing such work. Thus, the judge concluded that the Respondent violated Section 8(a)(3) and (1) of the Act by failing to reinstate Torres to the packaging machine mechanic position.

The Respondent excepts, arguing that the packaging machine mechanic position is not substantially equivalent to Torres' prestrike job. We find merit in the Respondent's exception. As explained in *Rose Printing Co.*, 304 NLRB 1076, 1077–1078 (1991):

> [T]he touchstone for determining reinstatement rights is ascertaining whether the job is the same as, or substantially equivalent to, the prestrike job. To be sure, the striker's qualifications are not irrelevant. The issue of whether the striker is qualified to perform the job may shed light on whether the job is substantially equivalent. . . . it may well be that the job must be substantially equivalent to the prestrike job and the striker must be qualified to fill it. But the essential point is that mere qualification to perform the job will not suffice.

Thus, in *Rose Printing*, the Board reversed the judge, who had found that "[t]he Board clearly obligates an employer to offer former strikers any available unit position for which they are qualified,"[5] and found that the Respondent did not violate Section 8(a)(3) by failing to offer certain former economic strikers reinstatement to entry level general worker positions. The Board reasoned that the general worker positions were not substantially equivalent to the former strikers' prestrike jobs because of the lower wages and skill levels required for the general worker position.

Applying these principles to the facts in this case, we find that the Respondent was not obligated to reinstate Torres to the packaging machine mechanic position. Prior to the strike, Torres was a lead maintenance mechanic charged with responsibility for overseeing the work of other mechanics, including those who repaired packaging machines. He also occasionally performed such work himself. Accordingly, he was clearly qualified to fill the position at issue. However, under the above stated principle of *Rose Printing*, the mere fact that Torres was qualified to perform the job of packaging machine mechanic does not suffice to establish substantial equivalency.

The lead maintenance mechanic position involves significantly more responsibility and requires more skills than the packaging machine mechanic position. Indeed, as found by the judge, the packaging machine mechanic position is the "lower half" of Torres' prestrike job. Thus, reinstatement as a packaging machine mechanic would, in effect, be a demotion for Torres. We note, moreover, that the General Counsel adduced no evidence comparing the wages, hours or working conditions of the two positions. Accordingly, we find that the record does not support the judge's finding that the packaging machine mechanic position was substantially equivalent to Torres' prestrike position. We therefore reverse the judge and find that the Respondent did not violate Section 8(a)(3) and (1) by failing to offer Torres the packaging machine mechanic position.

5. Willie Smith

Willie Smith was an ESM operator when the strike began. On October 8, 1998, he unconditionally offered to return to work. The judge found that the Respondent should have reinstated Smith to a vacancy in the ESM operator position that was posted in October 1998. The Respondent excepts, contending that the position it posted in October 1998 was not substantially equivalent to the ESM operator position Smith held prior to the strike. We find no merit in the Respondent's exception.

The record shows that both before and after the strike, the primary function of the ESM operator was to sort walnuts using an Elbascan sorting machine. During the strike, the Respondent apparently purchased new Elbascan machines that were more highly automated and computerized. In addition, the Respondent consolidated a number of functions that were formerly performed by different employees into the ESM operator position. As a result of these changes, the ESM operator job as it existed, 1998 was somewhat more difficult than it had been before the strike. However, the primary function of the ESM operator, sorting walnuts using an Elbascan sorting machine, remained the same. Accordingly, we do not find that the position changed to such a degree that it was no longer substantially equivalent. We therefore affirm the judge's conclusion that the Respondent unlawfully failed to reinstate Smith to the ESM operator position that it posted in October 1998.

Contrary to the judge, however, we find that Smith is only entitled to backpay for a period of 6 weeks. In March 2000, the Respondent offered to train Smith in the newly constituted ESM operator position. Smith ac-

[5] 304 NLRB at 1083.

cepted the Respondent's offer, trained for approximately 6 weeks, and then voluntarily "signed off," i.e., relinquished his bid right to perform that specific job, because he "had difficulty learning the new job... preferring forklift work." (Section II.j. fn. 23 of judge's decision.) In light of these facts, we find that had the Respondent offered Smith the ESM operator position in 1998, as it was so required, Smith would have received the same training that he received in 2000, and would have resigned before completion, as he did in 2000. We further find that by his resignation, Smith voluntarily abandoned his interest in the ESM operator position. Accordingly, his backpay period shall run for 6 weeks, and the Respondent shall not be obligated to offer him reinstatement.[6]

Our dissenting colleague would not limit Smith's backpay period. He would strictly rely on a provision in the Board's Case Handling Manual defining the backpay period as "beginning when the unlawful action took place and ending when a valid offer of reinstatement is made," and find that Smith is entitled to backpay for the entire period between the unlawful discrimination and his valid offer of reinstatement, notwithstanding his rejection of the ESM operator position in 2000.

This argument misses the mark on three levels. First, although there is a presumption, whenever there is an unlawful deprivation of employment, that backpay is owed for the entire period between the discrimination and a valid offer of reinstatement, the presumption is rebuttable. Thus, a respondent is entitled to establish facts which would negate the existence of liability or which would mitigate that liability. *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 198–200 (1941); *NLRB v. Cambria Clay Products Co.*, 215 F.2d 48, 56 (6th Cir. 1954). Here, the Respondent has shown that Smith rejected the ESM operator position in 2000 because, as noted above, after completing 6 weeks of training he had difficulty learning the position and signed off, preferring forklift work. There was no rebuttal evidence, i.e., there was no evidence that the training result would have been different in 1998.

Second, our colleague fails to recognize the Board's duty and "broad discretionary" authority under Section 10(c) to tailor its remedies to varying circumstances on a case by case basis, in order to ensure that its remedies are congruent with the facts of each case. *NLRB v. J. H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 262–263 (1969); *NLRB v. MacKay Radio & Telegraph Co.*, 304 U.S. 333, 348, (1938) ("the relief which the statute empowers the Board to grant is to be adapted to the situation which calls for redress"). Here, in fashioning an appropriate remedy, we have tolled Smith's backpay period after 6 weeks because the evidence shows that had the Respondent offered Smith the ESM operator position in 1998, he would have resigned after 6 weeks. This remedy is designed to restore Smith as closely as possible to the economic position he would have been in, but for the Respondent's unlawful failure to reinstate him.[7] See generally, *Phelps Dodge Corp. v. NLRB*, supra.

Third, the remedy espoused by our colleague would place Smith in a better position than he would have been in had the unfair labor practice not occurred. Not only would such a remedy be a windfall for Smith, it would also be punitive for the Respondent. The authority of the Board to fashion an appropriate remedial order pursuant to Section 10(c) of the Act does not extend to imposition of what in effect is a punitive remedy. *Phelps Dodge Corp. v. NLRB*, supra.

Our colleague would find that the Respondent did not meet its evidentiary burden to rebut the presumption that Smith would have worked the entire period between the unlawful deprivation of employment and his acceptance of the ESM operator trainee position in 2000. However, we believe that the dissent's reasoning places an unreasonably high burden of proof on the Respondent.

Respondents in proceedings before the Board must prove diminution of damages by the usual standard in civil cases—a preponderance of the evidence. A "preponderance" of evidence means evidence sufficient to permit the conclusion that the proposed finding is more probable than not. See McCormick on Evidence § 339, at 957 (3d ed. 1984). See also *Jack in the Box Distribution Center Systems*, 339 NLRB No. 5, slip op. at 26 (2003); *The Fresno Bee*, 337 NLRB 1161, 1196 (2003); *Sahara Las Vegas Corp.*, 284 NLRB 337, 347 (1987).

Hence, the Respondent is not required to prove to a certainty or "conclusively," as the dissent would have it, that Smith would have left Respondent's employ after 6 weeks in 1998. The Respondent must only show that it is more likely than not. We believe Smith's testimony that he rejected the ESM operator position in 2000 after training for 6 weeks because of the changes in the job—changes that also existed in 1998—shows that it is more likely than not that he similarly would have quit after 6 weeks if offered the position in 1998.

[6] We shall leave to the compliance stage of this proceeding the question of whether any of Smith's earnings, while training as an ESM operator in 2000, should serve as an offset to the amount of backpay due.

[7] Our colleague also contends that Smith's rejection of the position in 2000 cannot be "time-shifted" and related back to 1998. However, he has cited no authority, and we are not aware of any, holding that in devising an appropriate make-whole remedy the Board is precluded from taking into account events that occurred outside the backpay period.

Aneco, Inc., 333 NLRB 691 (2001), enf. denied 285 F.3d 326 (4th Gr. 2002), cited by our colleague, is distinguishable. In *Aneco*, the Board concluded that the respondent failed to carry its burden of showing that the discriminatee would not have worked during the entire backpay period, because it did not present "specific evidence" of factors that would have led to the discriminatee's departure from work. Here, in contrast, we find that the Respondent has presented "specific evidence" of factors that would have led to Smith's departure from work. Thus, the Respondent here has "bridge[d] the gulf from could to would."

Significantly, in *Aneco*, the Board did not, as our colleague suggests, hold that in determining the length of the backpay period, events occurring outside the backpay period should not be taken into account. Rather, the Board ruled that the employer had the burden of proving that the paid union organizer, Cox, would have left the job after 5 weeks in 1993, when the employer wrongfully refused to hire him, as Cox did in 1998 when he left the job in furtherance of the union's organizing strategy 5 weeks after his remedial hire. Then, the Board, after giving detailed consideration to the arguments made and evidence offered by the employer, concluded that it was insufficient to satisfy the employer's burden of proof.[8] Thus, *Aneco* supports, rather than undermines, our reliance on such evidence in this case.

Our colleague finds that Smith's actions in 2000 are insufficient to warrant a finding that he would necessarily have done the same thing in 1998, and that any uncertainty about this issue should be resolved against the Respondent. Specifically, he argues that Smith's personal circumstances (e.g., health or financial situation or availability of alternative employment) may have changed between 1998 and 2000.

In this regard, our colleague asserts that we have engaged in speculation. In truth, it is he, not we, who has engaged in speculation. He says that Smith's personal circumstances *"may have changed."* (Emphasis added). The fact of the matter is that there is no evidence to suggest such a change. Thus, our colleague has engaged, by definition, in pure speculation.[9]

By contrast, we have not speculated. The job in 2000 was the same as it was in 1998, and the training in 2000 was the same as it was in 1998. Thus, there is a reasonable inference, based on facts, that Smith's inability to complete training in 2000 would not have been different in 1998.[10]

Contrary to our colleague, we have not ignored the principle that the burden of uncertainty rests with the wrongdoer. Smith testified that his reasons for leaving the position in 2000 related to the changes in the position that were instituted during the strike. These changes were present both in 1998, when Smith should have been offered reinstatement, and in 2000. And, as stated above, there is no evidence to suggest that Smith's circumstances were any different in 1998 than they were 2000. In sum, a preponderance of the affirmative evidence, and an absence of contrary evidence, clearly show that Smith would have left the job in 1998 as he did in 2000.[11]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Diamond Walnut Growers, Inc., Stockton, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order, as modified.

1. Substitute the following for paragraph 1(b).

"(b) Failing to recall strikers who have unconditionally requested reinstatement where their prestrike job or a substantially equivalent job has become available."

2. Substitute the following for paragraphs 2(a) and (b).

"(a) Rescind House Rule No. 25, and advise the employees in writing that the rule is no longer being maintained.

(b) Make Rosa Elena Juarez and Willie Smith whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the Remedy section of the decision."

3. Substitute the attached notice for that of the administrative law judge.

[8] The Fourth Circuit disagreed. It found that the Board abused its discretion when it failed to toll the backpay period based on evidence that the discriminatee worked only 5 weeks when reinstated by the employer. 285 F.3d at 332. Neither Chairman Battista nor Member Schaumber participated in the Board's *Aneco* decision and express no view as to whether it was properly decided.

[9] Indeed, if Smith was ill, or had alternative employment, or had a satisfactory financial situation, one wonders why he sought the job.

[10] In this regard, our colleague's statement that Smith "ultimately did not choose to retain the ESM position in 2000" is a bit off the mark. Smith did not simply "choose" not to retain the ESM job. The judge found that he "had difficulty learning the new job [and] eventually signed off [of it], preferring forklift work." (Sec. II.j. fn. 23 of judge's decision.)

[11] Our colleague says that he is not "certain" that this is so. However, he appears to use the term "certainty" to mean a 100 percent guarantee of correctness. Of course, in life, there are rarely, if ever, such guarantees. Thus, if that were the test, the burden would be virtually impossible to meet. We agree that the wrongdoer has the burden of proof. In our view, that burden is satisfied upon showing, by a clear preponderance of the evidence, that a given assertion is true.

Dated, Washington, D.C. November 28, 2003

Robert J. Battista, Chairman

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER WALSH, dissenting in part.

Contrary to my colleagues, I would not limit Willie Smith's backpay period to 6 weeks. My colleagues' limitation of Smith's backpay to a 6-week period is based on pure speculation and unwarranted inference, and is completely contrary to Board practice and precedent.

Smith was an ESM operator before the strike. During the strike, the Respondent changed the duties of the ESM operator position. When an ESM operator position became available in 1998, after Smith's unconditional offer to return to work, the Respondent did not offer the position to Smith and did not give him an opportunity to train for the position.

My colleagues properly reject the Respondent's contention that it was not required to offer Smith the ESM position in 1998 because the positions were not substantially equivalent. The judge found, and my colleagues and I agree, that even if the position were redesigned during the strike, Smith was entitled to be trained in the modified position, and the Respondent's failure to offer training to Smith in 1998, when the vacancy arose, was a violation of the Act.

My colleagues find, however, that Smith's backpay for this violation should be limited to 6 weeks because when, in March of 2000, the Respondent finally did call Smith back as an ESM operator trainee, he decided after 6 weeks to reject the job because it was not to his liking under the circumstances that existed then. I disagree with my colleagues' limitation of Smith's backpay, and would find, consistent with Board precedent, that Smith is entitled to backpay from 1998, when he should have been offered the ESM training, until 2000, when Smith was offered the opportunity to train for the ESM position.

My colleagues assume that because Smith rejected the position after 6 weeks in 2000, he necessarily would have done the same in 1998. That assumption is unwarranted. The fact that Smith ultimately did not choose to retain the ESM position when he was finally trained for it in 2000[1] does not necessarily mean that he would have made the same decision in 1998, had he been offered the position as he should have been. Because Smith's personal circumstances may have changed (e.g., health or financial situation or availability of alternative employment) between 1998 and 2000, it is pure speculation to make the assumption that Smith would have resigned his position after 6 weeks in 1998. The Board cannot legitimately impute Smith's later actions to an earlier time when circumstances may have been very different.[2]

Smith's actions in 2000 are simply insufficient to warrant a definitive finding that Smith would necessarily have rejected the position in 1998. My colleagues' obliteration of a major part of Smith's backpay period based on such an unwarranted assumption, in fact, stands Board precedent on its head. Under established Board precedent Smith is entitled to backpay for the entire period between the unlawful discrimination and his valid offer of reinstatement. See NLRB Casehandling Manual (Part 3) Compliance Proceedings Sec. 10530.2 (defining backpay period as "beginning when the unlawful action took place and ending when a valid offer of reinstatement is made").[3] Smith's entitlement to backpay for that period is unaffected by Smith's rejection of the position in 2000 because that rejection cannot be time-shifted and related back to 1998.

My colleagues state that they are aware of no authority holding that in devising an appropriate remedy, the Board is precluded from taking into account events occurring outside the backpay period. However, in *Aneco, Inc.*, 333 NLRB 691 (2001), enf. denied 285 F.3d 326 (4th Cir. 2002), the Board found that an administrative law judge erred by reducing the length of a discriminatee's backpay period based on speculation that, in light of the discriminatee's subsequent actions in quitting the job

[1] My colleagues say that I am "a bit off the mark" by characterizing Smith's actions in 2000 as a choice. This criticism is unwarranted. The fact that Smith may have had difficulty performing the job in 2000 and may have preferred forklift work at that time, does not make his decision to reject the ESM job any less of a choice.

[2] My colleagues claim that I am engaging in "pure speculation" by pointing out possible reasons why it is not necessarily a foregone conclusion that Smith would have rejected the ESM job in 1998 had it been offered to him at that time. To the extent that I am engaging in "speculation," I am doing so only to demonstrate the fallacy in my colleagues' conclusion that it is certain that Smith would have made the same decision concerning the ESM position in 1998 that he did in 2000.

[3] My colleagues concede that there is a presumption, whenever there is an unlawful deprivation of employment, that backpay is owed for the entire period between the discrimination and a valid offer of reinstatement. However, they contend that this presumption is rebuttable and that a respondent is entitled to establish facts which would negate the existence of liability or which would mitigate that liability. I do not disagree. However, contrary to my colleagues, for the reasons set forth herein, the respondent has not established such facts.

at issue, the discriminatee would not have remained on the job for the entire backpay period had he been offered the job when he should have been. In that case, the respondent unlawfully refused to hire Cox, a paid union organizer. Five years later, after the Board found unlawful discrimination, *Aneco* offered Cox a job. Cox accepted the position and worked for a period of 5 weeks. The General Counsel argued that Cox was entitled to backpay for the entire 5-year period between the time he applied for the job and the time *Aneco* offered him that job. However, the judge found that Cox would not have worked for *Aneco* for the entire 5-year period. He concluded that if *Aneco* had offered Cox employment when he first applied in 1993, Cox would have worked there only for about 5 weeks and then quit, because that is what occurred in 1998, after Cox began employment. The judge accordingly limited Cox's backpay to 5 weeks.

The Board reversed, finding that Cox was entitled to backpay for the entire 5-year period. In so concluding, the Board stated that "[i]t is the Respondent's evidentiary burden to bridge the gulf from *could* to *would* when disputing the propriety of a backpay period," and that the respondent had failed to do so. The Board found that in relying on Cox's subsequent actions as determinative of what would have occurred earlier, the judge had "contravened the well-established principle that 'the Board resolves compliance-related uncertainties or ambiguities against the wrongdoer.'" 333 NLRB at 692, citing *Ferguson Electric Co.*, 330 NLRB 514 (2000). While the Board's decision in *Aneco* was not enforced by the Fourth Circuit, it remains Board law and is based on well-established legal principles with regard to the applicable burdens of proof in a backpay case.

Here, it is simply uncertain what would have occurred back in 1998 if Smith had been offered the ESM position at that time. Any doubts or uncertainty as to what would have occurred in 1998 should be resolved against the Respondent as wrongdoer, not against the discriminatee. *Kansas Refined Helium Co.*, 252 NLRB 1156, 1157 (1980), enfd. 683 F.2d 1296 (10th Cir. 1982). My colleagues' assumption that Smith would have rejected the position in 1998 impermissibly resolves the uncertainty in favor of the Respondent.

I find, based on the Respondent's failure to submit evidence demonstrating that Smith's postreinstatement conduct in 2000 establishes what his response to a reinstatement offer in 1998 would have been, that it is inappropriate to rely on Smith's conduct in 2000 to establish that he would have remained on the job only for the same amount of time in 1998. As in *Aneco*, the Respondent did not "bridge the gulf" between *could* and *would*. While the Respondent may have raised some uncertainty as to what *could* have occurred in 1998 had the Respondent acted lawfully at that time, it has not met its burden of establishing what *would* have occurred.[4] The Respondent has shown merely that the position was not to Smith's liking in 2000. But that evidence does not conclusively prove anything about 1998. "In compliance matters, a wrongdoing employer bears the burden of proving that a discriminatee would not have remained at the same job which he was unlawfully denied." *Aneco*, supra, 333 NLRB at 691, citing *Dean General Contractors*, 285 NLRB 573 (1987). The Respondent has not met that burden.[5]

My colleagues maintain that I am requiring the Respondent to meet too high a standard, and that the Respondent's "burden is satisfied upon showing, by a clear preponderance of the evidence, that a given assertion is true." Even applying that standard, however, the Respondent has not met its burden of showing that Smith would have remained in the ESM position for only 6 weeks had he been offered that position in 1998.[6]

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[4] In finding that the "evidence shows that had the Respondent offered Smith the ESM operator position in 1998, he would have resigned after six weeks," my colleagues rely on Smith's testimony that his reasons for leaving the position related to the changes in the position. That testimony does not, in my view, support a finding as to what *would* have occurred in 1998 if Smith had been offered the ESM position at that time. The fact that changes in the position may have been intolerable to Smith at one time (2000) does not preclude them from being acceptable to him at another time (1998). I am unwilling to contravene established Board precedent and deny a discriminatee backpay to which he is otherwise entitled on the basis of this tenuous testimony.

[5] My colleagues fault the General Counsel for failing to present "rebuttal evidence" that the training result would have been different in 1998. It is not, however, the General Counsel's burden to present "rebuttal evidence" where the Respondent has not presented sufficient evidence to rebut the presumption that backpay is owed for the entire backpay period. Here, the Respondent has not done so.

[6] My colleagues accuse me of failing to recognize the Board's duty and discretionary authority to tailor its remedies in accordance with the facts of each case. I do not dispute that the Board has such authority. I am merely asserting that my colleagues are not properly exercising that authority. They see the "facts" here as establishing that Smith would have acted in the same manner in 1998 as he did in 2000. I see the "facts" differently. The Respondent has failed to meet its burden of establishing what *would* have occurred in 1998. In light of that failure, there are no "facts" to warrant a departure from established Board precedent.

My colleagues also aver that my application of established Board precedent would place Smith in a better position than he would have been in had the unfair labor practice not occurred, and that the remedy is punitive for the Respondent. Again, my colleagues base this argument on speculation as to what would have occurred in 1998. Because the Respondent has not met its burden of proving what would have occurred, any argument that Smith would receive a windfall is based on speculation and must fail. Nor is my application of established Board precedent punitive in this case. The Respondent is the wrongdoer here

For these reasons, I believe that Smith's backpay period should properly run from the time the ESM vacancy occurred in 1998 until Smith was offered the opportunity to train for the ESM position in 2000. However, because Smith rejected the ESM position after being trained for it in 2000, I would toll Smith's backpay at the time Smith rejected the position, and I would not require the Respondent to offer Smith reinstatement to that position at this time.

Dated, Washington, D.C. November 28, 2003

Dennis P. Walsh, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain or give effect to any rule which requires employees to seek management permission before distributing any written or printed material.

WE WILL NOT fail to recall strikers who have unconditionally requested reinstatement where their prestrike job or a substantially equivalent job has become available.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL rescind House Rule No. 25, and WE WILL advise you in writing that the rule is no longer being maintained.

WE WILL make Rosa Elena Juarez and Willie Smith whole for any loss of earnings and other benefits suffered as a result of our discrimination against them, including interest.

and thus had the burden of proving that Smith was not entitled to backpay for the entire backpay period. It failed to do so.

DIAMOND WALNUT GROWERS, INC.

Sharon Chabon, for the General Counsel.
Robert G. Hulteng and *Robert Leinwand (with Zev J. Eigen on Brief) of Littler Mendelson*, of San Francisco, California, and *William E. Hester III, (The Kullman Firm)*, of New Orleans, Louisiana, for the Respondent.
Kenneth C. Absalom (Nevin & Absalom), of San Francisco, California, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JAMES M. KENNEDY, Administrative Law Judge. This case was tried in Stockton, California on 6 hearing days beginning January 9, 2001, [1] upon a consolidated complaint issued May 30, 2000, by the Director for Region 32. The complaint is based upon unfair labor practice charges filed on April 1 and May 18, 1999, and February 4, 2000 by Cannery Workers, Processors, Warehousemen & Helpers Local 601, International Brotherhood of Teamsters, AFL–CIO (the Union or the Charging Party). The complaint alleges that Respondent, Diamond Walnut Growers, Inc., has violated §8(a)(3) and (1) of the National Labor Relations Act (the Act). Respondent denies the allegations. Briefs were filed by both the General Counsel and Respondent. Due to certain vicissitudes in the complaint, I permitted both Respondent and the General Counsel to file responsive briefs. All briefs have been carefully considered, and I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a California corporation which operates a factory in Stockton, California, where it processes, sells and distributes walnuts. It annually sells products valued in excess of $50,000 to customers located outside California. It has admitted both that it is an employer engaged in commerce within the meaning of § 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of § 2(5) of the Act. I so find.

II. ALLEGED UNFAIR LABOR PRACTICES

Issues

For the most part, this is a striker replacement case, although there is one allegation concerning a no-distribution rule. Connected to the striker replacement issues are two allegations affecting employee reinstatement rights: that Respondent failed to use corrected telephone numbers for seasonal work calls and denied unreinstated strikers access to the job bid bulletin board.

The Complaint Track

This should have been a straightforward case, but the complaint as originally presented was both confused and confusing.

[1] The hearing was noticed for January 8, 2001, but that day was utilized to resolve certain prehearing issues, review of subpoenaed material, clarification of the complaint and the like. The hearing itself took place on January 9–11, February 15 and March 20–21.

It had no clear organizational system, it is neither consistently chronological nor consistently topical; it is not set logically by discriminatee name, and even those have been shifted around the complaint. It is directed at 1998, 1999, and 2000 fact patterns affecting unreinstated strikers who had struck on September 4, 1991.

Both at my order and on her own initiative, counsel for the General Counsel has attempted to correct, clarify and amend the complaint in an effort to achieve a stable focus on the issues. In some respects that effort failed, for even in her brief, counsel for the General Counsel seeks to withdraw allegations, add people to certain theories and even correct some dates. At this juncture there is no single document to which one can look to become apprised of all the issues.

I cite those modifications which I can follow. On January 8, 2001, eleven changes were made. On January 9, paragraphs 9(a) and (b) were expanded to name nine and five specific employees respectively, where none had been listed before. On January 10, an employee was added to paragraph 11(f). During a hiatus, on January 18, the General Counsel by letter motion (at my direction) moved to substitute paragraphs 9(c) and (e) in their entirety. This was done because the original versions were said to be class action-type allegations but without appropriate definition. As originally drafted, Respondent had no opportunity to know how many or which employees were involved. The letter motion sought to cure this deficiency. It named eight employees in the new 9(c). The old 9(e) blossomed into eleven subsets, naming individuals for the first time.

At that point I concluded the General Counsel had been give sufficient opportunity to perfect the complaint. Up 'til then, all the amendments had been made before or during the General Counsel's case-in-chief and the hiatuses between sessions had been of sufficient duration to negate any claim by Respondent that it had been surprised or prejudiced. Indeed, the General Counsel acknowledged that further amendments would not be necessary. Yet, on March 21, the last day of the hearing, during Respondent's case and shortly before cross-examining Respondent's principal witness, once again the General Counsel sought to amend the complaint. The motion was denied as untimely. Despite that, the effort has continued in the General Counsel's initial brief, filed on May 29. There, in both text and footnote, the General Counsel offers fifteen proposed amendments, two of which aim to add employees to two existing paragraphs, ten of which seek to withdraw claims and three which may be characterized as corrections. Some of the withdrawals are supported by assertions that the allegations are unproven; some are not supported at all, though presumably they, too, are also regarded as unproven. However, the Charging Party, in response to my inquiry, has voiced no objections to those withdrawals, and the motion to withdraw them is granted.

By number, this leaves the following unfair labor practice paragraphs of the complaint intact:

amended 9(c) [except Thelma Pompa];
9(d),
amended 9(e)
(i) [except Rosa Elena Rodriguez]
(iii) [except Gurmeet Shergill]
(iv) [except Juana Silva]
(v)
(vii)
(viii)
(ix)
(x)
(xi)
10
11(b) [except Juana Silva]
Amended 11(c) [including Alfredo Rodriguez]
11(d)
Amended 11(f) (Alternative 1). [including Amanda Gomez (Sigman)]
Amended 11(f) (Alternative 2). [including Amanda Gomez (Sigman), but excluding Willie Smith]
11(g)
11(h) [except Steve Bosche]
Amended 11(i)
12
13(b)

Some of the confusion arises because of the fact that Respondent changed its characterization of employees in one of the collective bargaining proposals which caused the impasse in 1991, and which was later implemented. Respondent had always had a complement of year-round employees and had always hired short term employees during the 6–7 week walnut harvest season which usually begins in late September or early October. One of the strike issues was Respondent's proposal to reclassify the year-round employees as "regular" and the short-term employees as "seasonal." This system changed the existing seniority and intra-company bid systems. These changes have never been challenged as unfair labor practices, and insofar as this case is concerned, are entirely nondiscriminatory. One thing which did not change was Respondent's need for employees to work only during the harvest.

Respondent needs, for that 6-week period, about 350 additional employees, always on short notice. To obtain them, it tries to have a pool of about 1200 people it can call. To establish the pool each year, it starts with the people who had worked the season the year before. It routinely sends them a postcard asking if they wish to be considered for the upcoming season, setting a deadline for a response. It also accepts applications from the outside. Those names, since shortly, before the 1991 strike have been kept in a computer database known as the HP 3000 system. This system includes all active payroll people, whether regular or seasonal. It is used, among other things, to generate the daily call sheets for those who want to be considered for seasonal work. None of the strikers was activated on the HP system for seasonal calling until they advised the Company that they were unconditionally asking for reinstatement and also advised that they were willing to perform seasonal work.

What often happened was that the Union would transmit either a letter on an employee's behalf, or a list of employees, advising the Company that the employee was now willing to come back to work. While this letter does approach an uncon-

ditional offer to return, it is actually somewhat precatory [2] on the point. It doesn't really offer their unconditional return; instead it says ". . . . the employees have decided to make an unconditional offer to return to work immediately," but doesn't go on to actually make the offer. The remainder of the letter is sufficient to give the recipient some, but perhaps not complete, confidence that such is the letter's intent. E.g., GC. Exh. 30 series. Sometimes the "unconditional" language was not used at all. E.g., GC Exhs. 43, 48.

When such an offer was made, both to defeat any ambiguity that the incomplete usage or absence of the word "unconditional" might cause, and also to ascertain the employee's wishes concerning seasonal work, Respondent asked the employee to fill out a form, known in this record as the "Diamond form." In use since 1993,[3] that form first gave the employee the opportunity to state with certainty that his or her offer to return was unconditional, and second, under the heading "Applicable During the Walnut Harvest Season Only", an opportunity to say whether he or she was willing to accept seasonal work.

In many respects this was no different from previous season employees responding to being sent the postcards, except this occurred throughout the year for returning strikers. It did not matter whether the returning striker was seasonal or had held a bid job (now called regular bid) at the time of the strike. If the employee was willing to perform seasonal work even where his or her regular job had not yet come open, Respondent activated that person's name in the HP system where it had resided (with some possible exceptions) since 1991.

Moreover, all unreinstated regulars (bid job holders) who asked to return (either by themselves or through a union request, and without regard to whether they had utilized the Diamond form), were placed on a computer program spreadsheet (the Excel spreadsheet) created just for that purpose. According to Respondent, whenever a regular job comes open, it consults that spreadsheet to see if a striker can fill the job; if not, it is put open for bid.

Another feature of the Diamond form was that it contained Respondent's statement, somewhat broader than the *Laidlaw Corp.*[4]*/Rose Printing*[5] obligations, that the Company will notify the employee "[i]f individuals outside the current regular workforce are being considered for positions" for which the employee is "qualified."

In addition, there are "seasonal bids." These differ from regular bids in that they are available only to persons holding regular jobs. When the season begins, there are several jobs which open only for the season. These often involve skills not used by the employee during the year, are higher paying or offer a different type of work. These jobs are also posted, but as a seasonal bid, and they last only for the harvest season. A year-round employee, learning of a seasonal bid job may choose to bid for it. As with all bids, there are certain requirements and certain disqualifications. Plus, the jobs are limited in number. Thus, not every regular employee seeking a seasonal bid job will succeed in being selected. Seasonal bidding is nonetheless a perquisite of being an incumbent regular employee.

Nonbid seasonal employees are usually assigned to one of four labor intensive tasks: loader, general labor, production worker and case packer. In addition, seasonal employees may not bid on seasonal jobs, nor do seasonal workers acquire any plant seniority or eligibility for fringe benefit plans.

The pleadings confusion occurred because many of these facts were not understood by the General Counsel at the time the complaint was issued. Furthermore, the General Counsel was unaware that nearly all regular jobs continued to be held by replacement employees. Thus the complaint withdrawals are designed to eliminate theories found to be inconsistent with the facts as now known. For example, paragraph 9(a) alleges that since October 7, 1998 Respondent had discriminated in four ways against striking regular employees who had offered to return: refusing to offer them their old or substantially equivalent job; refusing to put employees on a preferential recall (*Laidlaw*) list; refusing to consider them for nonequivalent work on a nondiscriminatory basis (except for seasonal work); and refusing to hire them for nonequivalent work on a nondiscriminatory basis (except for seasonal jobs). Those allegations fell when the General Counsel learned of the Excel spreadsheet and when it learned that no nonequivalent work had come open. The General Counsel asked to withdraw paragraph 9(a) by its brief. Paragraph 13(a), dealing with 1999 offers to return was handled similarly and for the same reasons.

In general, the allegations which remain are not global, but individual. Their circumstances are governed by the usual legal principles of *Laidlaw Corp.*, supra, and *Rose Printing Co.*, supra. Those cases stand for the proposition that upon an unconditional offer to return to work, an economic striker is entitled to his or her job back when the permanent replacement employee separates from that job. In addition, the employer must offer the returning striker a substantially equivalent job if one should come open. However, the striker is not entitled to an offer to any job for which he or she may also be qualified.

In addition, in *Diamond Walnut Growers*, 316 NLRB 36, 37 (1995), the Board observed that the General Counsel had conceded that seasonal jobs at this plant are not substantially equivalent to the year-round jobs. That is because, as already noted, even if the skills are identical, e.g., lift truck driver, quality control inspector, machine operator (all of which are bid jobs during the year, but also become available for 6 weeks as a seasonal bid job to some other regular worker), the jobs are of short duration, without fringe benefits, lack seniority and carry

[2] As used here 'precatory' means "referring to a wish or advisory suggestion which does not have the force of a demand or a request which under the law must be obeyed."

[3] The Union has never raised any objection concerning the form. In September 1998, Respondent's director of human resources, Arthur Reyes, sent union secretary-treasurer Lucio Reyes a packet of the forms. In the letter he explained that the company wished to have unconditional return to work offers on file and to clarify that the returning employee was (or was not) willing to accept seasonal positions. Lucio Reyes responded that the Union's own letters fully satisfied the employees' legal obligations, but he concluded, "Nonetheless, we have no objection of our members signing the forms you have provided if they wish."

[4] 171 NLRB 1366 (1968), enfd. 414 F.2d 99 (7th Cir. 1969), cert. den. 397 U.S. 920 (1970).

[5] 304 NLRB 1076 (1991).

no expectancy of permanence. So far as I can tell, the General Counsel has not drawn back from that concession.

Moreover, the nonskilled regular workers, i.e., packers, loaders, production worker, laborer, are the ones who hold (together with the bid job holders) the right to bid for the seasonal bid jobs. Thus it is a mistake, due to both the governing law and company policy, to conclude that there is some sort of equivalency between regular and seasonal jobs, even though the jobs carry similar titles or descriptions or where the skills overlap.

a. The no-distribution rule

Paragraph 7 of the complaint asserts that since "at least November 18, 1998, Respondent has maintained" an unlawful no-distribution rule. Specifically, it asserts that House Rule No. 25 states: "Distribution of written or printed material of any description without written permission of management is not permitted." Respondent agrees that the rule has been in existence since at least that time, but observes that the rule and its predecessors have been in effect since at least 1970 and originally appeared in a slightly different form in the 1970–1973 collective-bargaining agreement as a plant rule. See Exhibit B to that contract, rule 19, which states that an employee shall not "circulate petitions or distribute handles or pamphlets on association property without proper authority." As time passed the house rules were separated from the collective bargaining contract but the distribution regulation continued to require management permission. By 1988 the rule had found its way into the employee handbook as an item of misconduct: "Distribution of written or printed material of any description without written permission of management." Similarly, in the 1988-1991 collective-bargaining agreement, Article II, § 4 with respect to bulletin board posting and distribution, requires the Union prior to posting and/or distributing a notice, to submit a copy to the Company's industrial relations director. The rule also put limits on the nature of material to be posted upon the Union's bulletin board. And, the provision reappears, unchanged, in the 1995 and 1998 implemented proposals. All three contain a clause obligating the parties to bargain over the posting or distribution of documents not specifically discussed in the clause.

The General Counsel argues that this is the exact type of rule which the Supreme Court held to be unlawful in *NLRB v. LeTourneau Co. of Georgia*, 324 U.S. 793 (1945). Respondent counters that the rule and its predecessors have been in effect since 1970 and have at all times had the consent of the Union. It asserts that as a result the union has waived the right to complain about the nature of this rule.

Curiously, there is no showing that the Union has made any effort to distribute any written material inside the plant. In some respects, therefore, the complaint is aimed at a hypothetical situation. Yet, one can see the defects in the rule itself. On its face is not limited to working time or working areas. *Our Way, Inc.*, 268 NLRB 394 (1983). Yet, I suppose, if the Union chose to distribute written material and sought to follow the rule by getting management permission, given Respondent's benign approach, it is quite likely that the only limits which would be placed upon the distribution would be those which would guarantee that work not be disrupted. In fact, the Union and Respondent have amicably worked together under these rules since at least 1970 and no problem seems to have arisen, no doubt due to the mature relationship the parties had until the strike. Even now there seems to be no problem with respect to the distribution portion of the rule. At least no party has contended otherwise and the record is devoid of evidence that Respondent has been obstructive of the Union's desire to distribute material not listed in the contract (implemented proposal).

Despite all that, both the Supreme Court and the Board are clear that such a rule interferes with the employees' exercise of their rights under §7. A nearly identical issue was presented to the Court in *NLRB v. Magnavox of Tennessee*, 415 U.S. 322, 325 (1974). The prohibition there was found in the collective-bargaining agreement and was equally long-standing. It said at 325–6:

> The place of work is a place uniquely appropriate for dissemination of views concerning the bargaining representative and the various options open to the employees. So long as the distribution is by employees to employees and so long as the in-plant solicitation is on nonworking time, banning of that solicitation might seriously dilute §7 rights. For Congress declared in §1 of the Act that it was the policy of the United States to protect 'the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing.'

Section 7, the Court held, protects employees as they evaluate the job their union is doing. They are free to support the incumbent, get rid of it, or change unions. Prohibitions such as this, it said, tend to favor protecting the incumbent union, giving it an advantage to which it is not entitled. Accordingly, the Court struck down the contract prohibition on in-plant distribution. Thus, *Magnavox* actually expanded *NLRB v. LeTourneau Co. of Georgia*, supra. It is true that the rule here, requiring prior approval before distribution, is the same type of rule stricken in *LeTourneau*, but *Magnavox* added that the fact that the rule was collectively bargained did not amount to a waiver of employee rights, except in some narrow circumstances not present here. See also *The Mead Corp.*, 331 NLRB 509, 510 (2000) and *Awrey Bakeries*, 335 NLRB 138 (2001).

I therefore find the rule to be unlawful and in violation of §8(a)(1) of the Act.

b. Paragraph 9(b); alleging that four seasonal employees who made unconditional offers to return were denied reemployment for the 1999 season

As amended, paragraph 9(b) asserts that employees Rosa Elena Juarez, Mari Ledezma, Elpidia Pina and Mariano Tobin were seasonal employees at the time of the strike and that they had unconditionally offered to return on August 9, 1999. It further asserts that they were denied seasonal employment in 1999 because their names were not activated on the HP system as they did not file a Diamond form. [Two of these individuals, Pina and Tobin, are also alleged as discriminatees in complaint paragraph 9(e)(iii)].

All four of these individuals are included in a list which union secretary-treasurer Lucio Reyes submitted on August 9, 1999 advising Respondent that all wished to be unconditionally

reinstated. In 1999, none of these individuals submitted a Diamond form or in any other way advised of their interest (or lack of interest) in seasonal work. In July, 2000, Juarez did file a Diamond form. She was activated on the HP system and called for seasonal work in late September, first as a case packer and subsequently as a conveyor operator.

With respect to Juarez, Respondent's records show that shortly before the 1991 strike she had worked for 2 days, one as a general laborer (for 6 hours) and one as a machine operator trainee (for 8 hours).

Records for the other three do not appear to exist. According to Hector Bolanos, currently one of Respondent's human resources managers, all of the 1990 seasonal employees were considered to be strikers, unless they had been separated for some reason. Those who were not considered strikers were those who had terminated the employment relationship in some fashion, including failing to return the 1991 postcard. We also know that before July 1991 Respondent did not keep its payroll records on a computerized system. It was at that time that the HP payroll system was established. It may therefore be presumed (though not without some niggling doubt) that if individuals worked for Respondent before July 1991, but not afterwards, their names will not appear in the HP system. It is possible therefore, that a few 1990 seasonals who had been cleared for 1991 work but who had not yet been called by the time of the September 4, 1991 strike, could be considered striking employees. It is also possible that a few 1990 seasonals never returned the 1991 postcard and were therefore not 1991 employees and not actual strikers, even if they later joined the Union's picket line.

The burden of demonstrating that an individual is a striker entitled to reinstatement rights rests with the General Counsel. The Board has long held that the burden of proving discrimination lies with the General Counsel. *Rubin Bros. Footwear*, 99 NLRB 610, 611 (1952). It has also held that it is the General Counsel's burden to prove that a *Laidlaw* vacancy has occurred. *Aqua-Chem, Inc.*, 288 NLRB 1108, 1110 fn. 6 (1988).[6] To that end, the General Counsel is obligated to first prove that the alleged discriminatee was an employee of the employer at the time of the strike. It must then show that the individual joined the strike by withholding his or her labor from a specific job and subsequently, that the striker sought to be unconditionally reinstated. For reinstatement purposes the job from which the striker left to join the strike is the job to which the striker is entitled under the *Laidlaw* rule.

The only individual listed in this paragraph who the General Counsel has shown was employed at the time of the strike is Juarez. Neither she nor the other three actually gave testimony concerning their situations. The General Counsel had the opportunity to put on such evidence during her case-in-chief, but did not do so. It is true that at the end of the hearing she made an offer of proof which I denied as inappropriate for rebuttal. Respondent had offered nothing to rebut. It had observed that there was no evidence presented by the General Counsel to demonstrate what three of the four individuals had been doing at the time of the strike. It was certainly not Respondent's burden to respond to a lack of evidence, and thus rebuttal was not fitting.

Accordingly, I conclude that the General Counsel has failed to prove that Ledezma, Pina and Tobin were employees who went on strike in September 1991. The allegation will be dismissed with respect to them.

Juarez is a little different. Here, Respondent's records demonstrate that she was employed at the time of the strike. It may also be inferred that she was a seasonal employee since her 1991 employment seems to have begun on August 30 (for August she had only 8 hours work). And, she was employed on September 3, the day before the strike began. Therefore the record shows that Juarez was a seasonal employee at the time of the strike.

The question then is whether her failure to submit a Diamond form in 1998 is a sufficient reason for Respondent to have not activated her on the HP system for seasonal calls. In some respects the arguments made here are one of finger-pointing. The General Counsel asserts that when seasonal employees sought to return, that the Union's letter should have been sufficient, since these employees were only seasonals, and could not have been seeking reinstatement to bid jobs. Respondent counters that even though they were seasonals, seasonal employment was periodic and that seasonals were expected to make some minimal effort to advise the Company that they wanted to work in the upcoming season. To remain eligible, seasonals were asked to do the absolute minimum in the ordinary course of things—fill out and return the postcard. Since postcards had not been sent to strikers, Respondent attempted to make it equally easy by having them fill out the Diamond form. From its point of view, the Diamond form and the postcard were equivalent notices. If one chose not to return the postcard, then one was not considered for seasonal work. In parallel, if one did not fill out the Diamond form advising that one wanted seasonal work, one was likewise not considered.

Yet, the Diamond form was a redundancy, at least insofar as a seasonal job is concerned. If the only job employee held was seasonal, it is hardly any great step to know that when the employee files a reinstatement request, he or she wishes to be reinstated to a seasonal job. Here, Juarez was known at the time of the strike to be holding a seasonal post. When her name appeared on the Union's list, she matched up as a seasonal employee. The Union's transmission was more than adequate for seasonal purposes. Respondent should have recognized Juarez as such and treated her as requesting seasonal employment for the 1998 season. It was a violation of §8(a)(3) and (1) to have failed to do so.[7]

[6] Enfd. 910 F.2d 1487 (7th Cir. 1990), petition for rehearing denied 922 F.2d 403 (7th Cir. 1991), cert. denied 501 U.S. 1238 (1991).

[7] I do not accept the General Counsel's argument that the Diamond form was designed to extinguish the preferential employment right of the strikers. Among other things, it was a well-intentioned effort to assist strikers in obtaining interim employment if their regular job had not yet come open. In this instance, it would appear that a seasonal employee fell through the proverbial crack in an attempt to treat strikers neutrally. Lack of motive, of course, is not a defense to the conduct.

c. Paragraph 9(c); alleging that since October 7, 1998 Respondent failed to offer regular and/or seasonal employment to seven strikers because it did not update telephone numbers

The seven individuals who are alleged to have been discriminated against in this complaint paragraph are: Virginia Galabis, Amanda Gomez (Sigman), Chiu Mar, Joel Perez, Hector Rosas and Maria Ruiz. The first problem which all seven of these individuals face is whether the General Counsel has shown them to be strikers in the first instance. It is true that all of them filed offers to return, either through the Union or by filing a Diamond form. Indeed all filed Diamond forms in August or September 1998, indicating that they wished to be considered for seasonal work. And, all are listed in an October 28, 1998 transmission from Respondent's Art Reyes as "employees who worked before the strike and are currently active in the [HP] system." A careful reading of that document does not lead to the conclusion that Respondent has acknowledged those listed to have been strikers, although no doubt most of them were. All of them, however, had been employed during some period before the strike. Some had been 1990 seasonals while others may have separated from employment before the strike began. Their employee numbers were known and were listed in the transmission. But, to conclude that the individuals who appear on that list were all strikers would be presuming too much. Yet, I think it is fair to conclude that the Union and employees themselves in 1998, 7 years after the strike began, believed themselves to be strikers. Certainly they behaved that way, seeking reinstatement in the routine way. The main common thread for these individuals is that after they filed their Diamond form, Respondent sought to call them for seasonal work but failed to contact them despite the fact that either they or the Union had supplied updated telephone numbers, usually on the Union's offer to return. Still, the company records are not clear on all of these individuals and only Gomez was called to testify. Keeping that in mind, I proceed to each of the discriminatees alphabetically.

Virginia Galabis. The General Counsel concedes that it is uncertain whether before the strike Virginia Galabis held regular or seasonal status. Indeed, she has made no effort to determine what job Galabis held or when she held it. Certainly the record is of no assistance. The only thing we know about her previous employment is that she had been employed at some point before the strike, since she has an employee number and she was listed in the HP system, together with telephone numbers. That suggests that she may have had some work after July 1991. We also know that in September 1998 she filed both a union request to return and a Diamond form saying she wished to be considered for seasonal work. As a result, Respondent did activate her for purposes of calling her for the 1998 season. Despite the fact that her union request showed an updated telephone number, that number was not checked against the number in the HP system. As Bolanos explained, changes are made in that system only when an employee files a change of name/address/telephone number form. Had any of the employees listed in this complaint paragraph done so, he explained, the system would have picked them up.

In Galabis' case the October call sheets show that she was called on October 2 and 14, but the number was disconnected. Bolanos explained that due to the sheer numbers that are called during the season, Respondent's callers make no effort to obtain correct numbers, relying on the employee to file change forms if they want to work. The callers simply operate from a computer-generated document, trying to fill slots as quickly as they can. If they are unable to contact an individual, they simply move on to the next.

Given the fact that Galabis' prestrike status is unknown, and it was the General Counsel's responsibility to demonstrate her to have been striker, I must conclude that there is no showing that Galabis was entitled to return at all under the *Laidlaw* doctrine. The telephone number issue is simply immaterial. Accordingly, that portion of paragraph 9(c) relating to her must be dismissed.

Amanda Gomez (Sigman). At the time of the strike Gomez was a regular employee who had just become a machine operator trainee. Until July 1991 she had been a laborer. She was on modified work until late August when she became the trainee. When she decided to return to work in 1998, she filled out a Diamond form on August 28, saying she would consider seasonal work, later filling out a second Diamond form as well as a union offer to return dated September 10. She was activated in the HP system and on October 12 and 13 a scheduler called the numbers shown in the system but received no answer. She had listed her current telephone number on her union offer to return of September 16. Following its normal procedure, Respondent had not picked it up.

Clearly Gomez was entitled to a *Laidlaw* reinstatement when her regular job came open. However, she was not entitled to seasonal work under *Laidlaw*. It is true that Respondent sought to call individuals in Gomez' situation since they had advised that they would accept seasonal work. Had the numbers been correct, she clearly would have been given the opportunity to accept seasonal employment. It does not follow however that Respondent was discriminating against her by failing to pick up her current telephone number from the union offer. I think it is fair to say that a striker such as Gomez is entitled to be considered for employment on a nondiscriminatory basis when she seeks a non-*Laidlaw* job. However, the General Counsel has not shown that a failure to update a telephone number had any discriminatory motive or impact. Indeed, as a regular employee Gomez was familiar with Respondent's procedure for updating personal information in the company records.[8] I think it can be said that at best this was some kind of mistake, either Gomez' or Respondent's. Both can be faulted to some degree. Either way, no claim of discrimination will lie. This portion of paragraph 9(c) will be dismissed.

Chiu Mar. Bolanos acknowledges that at the time of the strike Chiu Mar was a regular employee, although her actual job is not known, nor is it necessary to know it. She was not called as a witness. On September 1, 1998 she filed both a union offer to return and a Diamond form in which she said she would consider seasonal work. She was activated in the HP system and on October 3, 12, and 13 Respondent attempted to reach her by telephone, but the number dialed was dsconnected. The number which Respondent called was one digit

[8] In fact, on May 17, 2000, Gomez did fill out the proper form.

different from the number which she had included on her union offer to return. It would appear that the number in the HP system had been entered incorrectly many years before. (She had a 1984 seniority date.)

As with Gomez, Mar appears to have been the victim of some type of error. She was, of course, entitled to her prestrike job under *Laidlaw*. However, those rights did not extend to seasonal work. She was entitled, insofar as seasonal work is concerned, to be treated in a nondiscriminatory manner. Respondent accepted her offer to perform seasonal work and activated her in its system. Unfortunately, the system contained an error which prevented the Company from reaching her. An error of this nature does not qualify as a discriminatory act. As the victim of an ancient clerical error, what happened was unfortunate but it did not offend §8(a)(3). That portion of paragraph 9(c) relating to Mar will be dismissed.

Joel Perez. Again, the General Counsel concedes that it does not know whether Joel Perez was a seasonal or regular employee at the time of the strike. Indeed, the General Counsel has not shown that Perez was even employed when the strike began. Respondent has no records concerning his employment at that time. Nonetheless, Perez does appear in the HP system with an August 26, 1991 rank date. He also appears on the October 28, 1998 transmission to the Union as having been activated in the system. He was not called as a witness and we therefore do not have the benefit of his recollection.

On September 16, 1998, he filed both a union request to return form and a Diamond form. On the union form he included a current telephone number which differed from the two found in the HP system. On October 3 and 13, 1998, a caller telephoned the number in the system, learning that it was a wrong number.

While one might surmise that Perez had been hired as a seasonal worker judging from the rank date which appears on the call sheets, and that he had worked for only a few days before the strike, that would only be speculation. The General Counsel has not shown that Perez had actually been called to work at the time of the strike. More likely, assuming he was a seasonal, he had been accepted for seasonal work, but had not actually been called. Had he been called, the Company would have a payroll record so reflecting. As noted, the HP payroll system was instituted in July 1991. That would explain why he has an employee number but no record of any wages being paid. Any problems which may have arisen with respect to the correct telephone number which was in the system is simply not a concern. He wasn't entitled to an offer of seasonal work and the telephone number issue is overrun by the fact that he was never eligible in the first place. Therefore Respondent's failed effort to contact him is irrelevant to this analysis.

Accordingly, I conclude that the General Counsel has failed to prove that Perez, even as a seasonal, had any *Laidlaw* rights whatsoever. This portion of paragraph 9(c) of the complaint will be dismissed.

Hector Rosas. Again the General Counsel concedes that it does not know whether Rosas was a regular or seasonal employee. By that concession it is admitting that it does not know whether Rosas was employed at the time of the strike. Rosas' name does appear on the October 28, 1998 transmission from Respondent to the Union advising that he had worked before the strike and was currently active in the system. That activation occurred as result of Rosas' filing in September 1998 both a union request for reinstatement and a Diamond form indicating a willingness to consider seasonal work. On October 2 and 13 a caller attempted to contact Rosas but discovered that the number in the HP system was disconnected and that the alternative number was a wrong number.

It appears from the call sheet that Rosas had a rank date of September 12, 1990. Again one might surmise that he had been hired for the 1990 season and would have been eligible for 1991 seasonal work had he returned the postcard. It would be no surprise, therefore, that information about him, including an employee number, would be found in the HP system or in other personnel records. Therefore, when in 1998 he filed his Diamond form, his name would have been picked up and he would have been activated, as he was, for seasonal work.

Still, the General Counsel has not shown that he had worked in 1991 prior to the strike. Again, there is no payroll record which would be expected if he had worked between July 1991 and the September 4 strike. As with the others, this suggests that he was not on the active payroll at the time of the strike. Certainly there is no persuasive evidence that he was working at the time the strike began.

In that circumstance, I am unable to conclude that Rosas had a *Laidlaw* right to be returned to seasonal work. Thus, any problems which may have arisen with respect to the correct telephone number which was in the system is simply not a concern. He wasn't entitled to an offer of seasonal work and the telephone numbers issue is simply superseded by the fact that he was never eligible in the first place. Therefore Respondent's abortive effort to contact him is irrelevant to this analysis. The portion of paragraph 9(c) relating to Rosas will be dismissed.

Maria Ruiz. Like Mar, Maria Ruiz was a regular employee. However, there are no records which exist showing her job at the time of the strike. Whatever regular job she may have had is not in issue here. She may well have *Laidlaw* rights to that job. The focus of this complaint paragraph is on whether she was entitled to 1998 seasonal work. Thus the question is whether or not the fact that in September 1998, she filed a Diamond form suggesting that she would consider seasonal work gives her any right of recall. As with the others in her situation, I conclude that it does not. Respondent was under no obligation to offer seasonal work to her. The only obligation it had was to consider her request for consideration in a nondiscriminatory manner. In this regard when it received the Diamond form it activated her in the HP system. Subsequently, on October 3, 4, and 12 a caller telephoned the numbers which appeared in that system. This resulted in an answer machine from which no response ever came because it was a wrong number. She had, as with some of the others, placed the correct telephone number on her union offer to return which seems to have been filed sometime in September 1998. Oddly, it is not stamped as having been sent, as were the vast majority.

Accordingly, I am unable to find that any discrimination occurred here. Respondent was under no obligation to offer her seasonal work 1998; it was only obligated to treat her in a nondiscriminatory manner if she applied for other work. It appears

that Respondent did so. When it received her Diamond form it activated her in the HP system and proceeded to attempt to contact her about seasonal work. She, too, as a regular employee was aware of Respondent's procedures for changing personal information in the company records. She made no effort to do so and Respondent treated her exactly the same as it treated all persons on the call sheets that it was unable to reach. No discrimination occurred here, only some kind of error. Accordingly, this portion of complaint paragraph 9(c) will be dismissed.

Florentina Zuniga. The General Counsel makes no representation concerning the job, if any, Zuniga held at the time of the strike. Nor are there any company records showing that information. Call sheets utilized for her show that she has a rank date of September 3, 1987. The October 28, 1998 company transmission to the Union shows that she has an employee number and that she was activated in the HP system prior to that date. That activation was no doubt due to the fact that she had filed a Diamond form on October 1, 1998. (She had earlier filed a union offer to return on September 4.) She was not called as a witness and we do not have the benefit of her testimony concerning what she was doing at the time of the strike. The absence of any payroll records suggests that she was not on the active payroll at the time of the strike, nor had she been since July 1991. Again, surmise might take us to the conclusion that she was a seasonal worker, but that would certainly not be proof. If so, however, Respondent would have considered her to be on strike. Certainly she had a past employment history and was in the HP database, together with what turned out to be an outdated telephone number.

However, as with the others, conjecture is not proof and the General Counsel was obligated to prove that she was a striker on September 4, 1991. That has not been shown, and therefore I cannot conclude that Zuniga has any reinstatement rights as a striker under the *Laidlaw* rule. Therefore, whatever problems the incorrect telephone numbers may have caused, they have no bearing on her rights as a striker. So far as I can determine, she was not a striker. Accordingly, this portion of paragraph 9(c) will be dismissed as well.

d. Paragraph 9(d); alleging that respondent since October 7, 1998 has denied strikers the opportunity to review job postings at the plant.

Respondent's facility consists of multiple buildings not all of which are clearly described in the record. It has a main office building for the executive and administrative staff. Most outsiders would utilize the main entrance in this building to gain access to the facility. When anyone, outsider or employee, enters the main building, they must pass a receptionist before proceeding elsewhere in the plant. Plant employees are barred from that entry and usually enter the plant directly from one of the two employee parking lots some distance away from the administrative building and much nearer the plant. Employee entry into the plant from that location must be approved by a plant guard, either at the parking lots or in the walkway leading to the plant building. Active employees have badges or identity cards (depending on what is being used in any given year). These are shown to the guard upon request. During the height of the strike, 1991–92, security was much stronger than it was in 1998 when individuals covered by this complaint began to seek to return. Now, as then, if an outsider seeks to enter the plant from that location, the guard determines if the individual has legitimate business and, if so, arranges entry, usually with the approval and/or accompaniment of a manager.

Between the main office and the plant, there is a cafeteria building. A breezeway connects the main building and the cafeteria, and there is a walkway between the plant and the cafeteria. At the breezeway there is a roll-up steel-grated door which is usually in the down or closed position. If one comes onto the property there, via the walkway to the door from the street, one can see into the breezeway. The company bulletin board can be seen at that location, the only spot utilized for the posting of job bids. [9] It is difficult to view the bulletin board from that vantage point, both because of the distance (6 to 7 feet) and because the board angles away from a viewer standing at that location. One could see, from the goldenrod color of the posting, that a job bid had been placed on the board, but one would probably not be able to read it.

Yvette Battles is a quality-control assistant who had participated in the strike. By 1998 she had returned to work. She reported to the union's Lucio Reyes many, if not all, of the job bids which were posted on the breezeway bulletin board. There is no evidence that the Union did anything with the information she supplied. Lucio Reyes did not ask Respondent for copies of the bids, nor did he advise any unreinstated striker to enter the plant for the purpose of filling out a bid form.

Respondent's Art Reyes testified that Respondent has never advised individuals who were not actually within the plant of any bid postings, including laid-off employees, vacationing employees, ill employees or employees on disability. Thus, it apparently never occurred to him or anyone else in authority to notify the Union of the bids as they were put on the board. He was, of course, cognizant of the *Laidlaw* rule and was on the lookout, through the Excel spreadsheet, for openings which the Company was obligated to offer an unreinstated striker.

Two types of bids are posted. One is for regular job openings, which during the period in question, seem to have been very few. The second was for seasonal bids. As noted earlier in this decision, the only individuals who were eligible to sign applications for seasonal bids were regular employees, that is, incumbents. As noted, they also had to meet several other requirements and there was no guarantee that a signer would be selected. No seasonal worker was eligible even if they possessed the requisite skills, because they were not incumbent regular employees.

[9] This location has been utilized for job bids for many years and is well-known to all employees as well as to the union officials, many of whom have worked in that plant. Indeed, the job posting procedure can be found in the 1970 collective-bargaining contract and, although perhaps modified since then, is a well ingrained plant procedure. That contract called for such postings to be placed on the employee bulletin board, and it would appear that the procedure has been followed ever since. Over the years there has been no other location for the posting of bids. Nor, does it seem, has the Union ever been routinely notified of job bids.

Thus, the initial question which needs to be asked here is whether unreinstated strikers were eligible for seasonal bids. In the abstract, it would appear that they should be. After all, many of them had performed similar jobs prior to the strike. Forklift driving skills, for example, would be the same whether they did it on a seasonal or regular basis. The same can be said for many of the other jobs which were posted as seasonal bids.

Yet this is not in the abstract. It was only a regular job holder who was entitled to make application for seasonal bid. That was true whether or not the incumbent ever went on strike. In fact, the right to bid on seasonal bids was one of the privileges of being a regular employee. Therefore, it can easily be said that unreinstated strikers had no right to be considered for a seasonal bid, at least if regular employees had signed the bid sheet for, analytically, there was no open job. If the seasonal bid was held by a regular employee, who was also a permanent replacement, that employee's job remained filled and no *Laidlaw* slot had come open. The only job which might have come open, depending on manning needs, would have been the regular employee's regular job, now temporarily open for a seasonal employee. When the season ends the regular employee will return to his regular job and the seasonal will depart. This type of employee shuffling does not create a *Laidlaw* opening. *Textron, Inc.*, 257 NLRB 1, 4 (1981), enfd. in pertinent part, 687 F.2d 1240, 1243–44 (8th Cir. 1982), cert. denied 461 U.S. 914 (1983).

Given the fact that no seasonal bids had come open for which an unreinstated striker was eligible, it is difficult to conclude that Respondent's handling of the bids had any impact on those who wished to be considered for jobs other than their *Laidlaw* position. The General Counsel's argument is that Respondent's bid posting procedure had the effect of preventing qualified, yet unreinstated strikers, from being employed in jobs which they might be able to do. That, she says, is discriminatory.

I am well aware of the holdings in the cases which the General Counsel cites, *Pirelli Cable Corp.*, 331 NLRB 1538 (2000); *Medite of New Mexico*, 314 NLRB 1145 (1994); *Oregon Steel Mills*, 291 NLRB 185 (1988) and *Arlington Hotel v. NLRB*, 785 F.2d 249 (8th Cir. 1985) (a pre-*Rose* case). Nonetheless, I do not believe any of them have applications here. The primary reason for that is the fact pattern presented here is significantly different from those. First, none of those cases involved a seasonal bid eligibility perk to their regular *Laidlaw* job. Second, in those cases, one can perceive that the bidding procedure was part of a plan to discriminate against strikers. There is no evidence of such a plan here. Indeed, Respondent, since 1993, has been offering strikers seasonal work if they wished to accept it while awaiting their *Laidlaw* opening.

It is fundamental under the Act that employees who engage in a lawful strike are protected by § 7 of the Act. *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938). To protect employees who have engaged in such a strike, the *Laidlaw* doctrine requires an employer to reinstate an economic striker who has unconditionally requested reinstatement upon the departure of the permanent replacement employee holding the same or an equivalent job. In *Rose Printing*, the Board held that a striker holding a *Laidlaw* privilege was not entitled to reinstatement to any other job which he might also be qualified to perform. It limited his right to return to the same or an equivalent job. In *Rose*, the Board also held, somewhat self-evidently I think, that a striker who has offered unconditionally to return, but whose job has not yet come open, is entitled to nondiscriminatory treatment with respect to any other job opening. In this regard, I do not agree with the General Counsel that strikers who are seeking jobs other than their *Laidlaw* job are to be given *Fleetwood*[10] (inherently destructive) treatment, where union animus is not an element of the violation.

Instead, the proper analysis in those situations requires some proof of animus. See, *Pepsi-Cola Bottling Co. of Topeka*, 227 NLRB 1959 fn. 2 (1977)[11] (where the respondent legally terminated all its employees, including former economic strikers, the Court's language in *Fleetwood* with respect to the reinstatement rights of economic strikers who have been permanently replaced is inapposite; incumbent upon the General Counsel to prove that the respondent was motivated by discriminatory intent in refusing to rehire former employees who had engaged in protected strike activity); *Atlantic Creosoting Co.*, 242 NLRB 192 (1979) (where the respondent eliminates a job during the course of a strike, animus is required to prove the conduct was discriminatory); and *Handy Andy*, 313 NLRB 616 (1993), enfd., 53 F.3d 1334 (D.C. Cir. 1995) (animus required where respondent inherited returning strikers from predecessor but did not hire them). Often, the animus is clear because the conduct is part of a scheme to avoid recalling strikers. See e.g., *Outboard Marine Corp.—Calhoun*, 307 NLRB 1333 (1992), enfd., 9 F.3d 113 (7th Cir. 1993). Therefore, as I read the *Rose Printing* reference to how an employer must treat a striker seeking some job other than his or her *Laidlaw* job, there must be some evidence of animus to make out a violation; the inherently destructive analysis of *Fleetwood*, *Great Dane*, [12] and like cases does not apply.

In my opinion, the conduct in the cases upon which the General Counsel relies for the proposition that denying strikers the right to bid on other jobs violates the Act, *Pirelli, Medite* and *Oregon Steel*, all supra, must be analyzed as part of a scheme to defeat rehiring strikers. It is not the manner of the posting itself which offends the Act, but the fact that it was part of an unlawful program to avoid recalling strikers. If the posting is not part of such a plan, it must be regarded as neutral. In this case, I do not find that Respondent had such a plan, although, as will be seen, a small number of returning strikers were not given their full measure of *Laidlaw* rights. That seems to have been more oversight than anything else.

Thus, the question presented by this complaint paragraph is whether or not Respondent, by maintaining its long-standing posting practice, has discriminated against strikers who have offered to return to work. Unlike *Pirelli* and *Medite* this Respondent has not taken any affirmative-action against strikers with respect to postings. It has simply done what it has always done, put the postings on the breezeway board. It is true that the custom makes it difficult for an unreinstated striker to find

[10] *NLRB v. Fleetwood Trailer Co*., 389 U.S. 375 (1967).
[11] Enf. denied on other grounds, 615 F.2d 266 (10th Cir. 1980).
[12] *NLRB v. Great Dane Trailers*, 388 U.S. 26 (1967).

out about them, but it is not impossible. Employees could have sought access to the bulletin board or the Union could have asked to be copied as the bids were posted.

Indeed, Battles provided the information about postings to the Union on a regular basis. Had the Union wished, or thought it was appropriate, to publicize those postings, it would have done so, by asking Respondent for its own copy or doing something with Battles' information. While there is no direct testimony regarding why the Union did not advise its members of the slots, it seems to me that it is reasonable to infer that the Union already knew the unreinstated strikers were not eligible for seasonal bid work. Therefore, there was no real point in testing Respondent's willingness to allow those same individuals into the plant to view the postings. That is also the reason, it may be inferred, that the Union did not ask for copies of the postings. Had employees been turned away by the guards, or had there been evidence of the type of discrimination seen in *Pirelli* and *Medite*, a different conclusion might be reached. However, because the employees had no realistic chance at these seasonal bid jobs, and because the Union knew it, there seems to be little proof, and no reason to assume, that Respondent's continuation of its long-standing past practice of posting seasonal bids could have had an impact on the strikers. Among other things, neither the strikers, nor their union, had advised Respondent that the strikers were even interested in jobs other than those to which they held *Laidlaw* rights.

It is true that there were a few regular bids which were posted and for which reasonable arguments can be made that some discrimination occurred. Those instances will be dealt with below in appropriate sections, on an employee-by-employee basis.

e. Paragraph 9(e)(i); alleging that since September 9, 1999, Respondent refused to offer a seasonal nonbid job to one employee.

This allegation essentially asserts that Respondent failed to offer 1999 seasonal work to *Maria Estrada*. It is true that Estrada was one of two employees who appeared on a list which Lucio Reyes sent to Art Reyes on September 7, 1999, saying that they wanted to return to work. The transmission was accompanied by Estrada's completed Diamond form dated that day, indicating a willingness consider seasonal work.

The General Counsel offered no evidence whatsoever concerning Estrada's status as employee in September 1991. There is no evidence that she was employee in 1991 or previously, much less an employee who joined the strike in September. In fact there is no evidence that this individual has ever been employed by Respondent.

The General Counsel has failed to meet its burden of proof with respect to this individual. It has not shown Estrada to be an individual entitled to any reinstatement right under the Act. This allegation must be dismissed for failure of proof.

f. Paragraph 9(e)(iii); alleging that since August 9, 1999 Respondent failed to offer seasonal nonbid jobs to six unreinstated (seasonal) strikers.

In most respects I am unable to see any difference between paragraph 9(b) and paragraph 9(e)(iii). Both assert that since August 9, 1999 Respondent did not recall certain individuals for seasonal work. In paragraph 9(b) employees Pina and Tobin are conceded to be seasonal employees. In paragraph 9(e)(iii) those two reappear, together with four others. Yet, the General Counsel makes no argument about Pina and Tobin in the section of its brief devoted to paragraph 9(e)(iii).

Marissa Maria Martinez. Alphabetically, the first of the six employees is Marissa Maria Martinez. There are no records showing what job, if any, Martinez had at the time of the strike in 1991. Her name did appear on an August 9, 1999 list of employees for whom the Union sought unconditional reinstatement. On that list the Union asserts that her previous job was growers inspection. There is no specific classification of growers inspection, although there is a department by that name. As in many departments, the workers there are officially classified as production worker.

Martinez did not testify and there is no evidence that she was employed in 1991 at the time of the strike. Bolanos, who offered payroll records for many other employees, could find no record for her. That suggests that if she was a previous employee, her employment preceded the computerized payroll system put in place in July 1991. Had she been on the payroll after July, her name would have appeared in the company payroll records. She may have been a 1990 seasonal, but there is no evidence that she had returned the postcard for 1991 or that she had been called for the 1991 season. There is no showing that her submission of the Diamond form activated her name on the HP system. That suggests that she was not in the HP system, intimating that she had not returned the 1991 season postcard at the very least.

For that reason, I must include that the General Counsel has failed to meet its burden of proof that Martinez was a striker entitled to reinstatement under the Act. The allegation insofar as it concerns her will be dismissed.

Elpidia Pina. This individual has previously been found to be ineligible for reinstatement under the Act. See the discussion under b. above.

Horacio Ramirez. Ramirez' situation is somewhat different. As with some others, the evidence demonstrating that he was employed by Respondent at the time of the 1991 strike is virtually nonexistent. And, like many others, he eventually filed two requests to return. The Union did so on his behalf on August 9, 1999. Five weeks later he filed a Diamond form on September 15, 1999, saying that he was willing to consider seasonal work.

Yet, the General Counsel has not shown when, if ever, he had been employed around the time of the strike. Furthermore, although he appears to be a forklift driver by trade, there is no evidence showing him to have been a forklift driver with Respondent on either a regular or seasonal basis, except for the Union's assertion to that effect in its August 9, 1999 request for reinstatement. Moreover, there is no showing that his submission of the Diamond form activated his name on the HP system. That suggests that he was not in the HP system, implying that he had not returned the 1991 season postcard at the very least.

Curiously, a year before these 1999 requests, on August 7, 1998, Ramirez applied for employment by Respondent as a forklift driver. He had attended a job fair given by Respondent

and had been induced to apply for work. During the course of his interviews, he never mentioned that he was an individual who had previously worked for Respondent and who had gone on strike in 1991. His application form as received in evidence (R.Exh. 46) shows employment with only two firms, both on a seasonal basis. It does not refer to employment with Respondent. A few days later Ramirez was called to an orientation session where he filled out another form in which he stated that he understood he was being hired as a strike replacement employee. The form has been in use since the strike began, both for regulars and seasonals. He was given a tentative offer of employment and then took and passed a drug test. Shortly thereafter Respondent, per his agreement, scheduled him for some forklift training. He did not appear for the training session, did not seek to reschedule, and ultimately was considered to be a voluntary quit. Had he followed through, he would have been a seasonal. Whether he would have been assigned a forklift is problematical, given the fact that seasonal forklift driving is a seasonal bid job for which he would not have been immediately eligible. If he knew that, it might explain why he did not continue to pursue the job application.

Although both parties make much of Ramirez's 1998 failed application, I do not think it is necessary to discuss it with great detail. The principal issue here is whether the General Counsel has demonstrated that Ramirez was an employee in September 1991 when the strike began. I must conclude that adequate proof has not been offered. Ramirez did not testify and there are no records proving his employment in 1991. Again, it is possible that he had not been called for 1991 seasonal work before the strike began or that he was a 1990 seasonal who had not returned his postcard for 1991 seasonal work. Those possibilities have not been explored and the record is bare of any evidence one way or the other.

I do think it is accurate to say that Ramirez's failure to mention that he was a striker, when he made his 1998 application, suggests that he was not employed by Respondent at the time of the strike. That is not entirely persuasive, because he may have intentionally concealed that status in order to become employed. Yet, if that were true it is unlikely that he would have signed the statement acknowledging that he was a striker replacement. Loyalty would not have permitted him to do so. On balance, it is clear to me that the General Counsel has failed to prove Ramirez was a striker.

Alfredo Rodriguez. Although this discussion concerning Alfredo Rodriguez is primarily aimed at paragraph 9(e)(iii), 1999 seasonal opportunities, the facts also encompass paragraph 11(c), concerning 1998 seasonal work.[13]

The General Counsel has not shown any evidence regarding what job, if any, Alfredo Rodriguez held at the time of the strike. The company records, according to Bolanos, do not disclose any employment in 1991. Indeed, it is not certain whether Rodriguez worked the 1990 season. The General Counsel does assert that Rodriguez was a seasonal employee.

It is true that on September 15 1999, Alfredo Rodriguez filed two offers to return to work, a union offer and a Diamond form in which he said he would consider seasonal work. Again, we have at least two possibilities: One, that he had worked the 1990 season, had returned the postcard but had not been called to work before the strike began or, two, that he failed to return the postcard for the 1991 season. He was not called to testify and we do not have the benefit of his recollection. There is no showing that his submission of the Diamond form activated his name on the HP system. That suggests that he was not in the HP system, perhaps indicating that he had not returned the 1991 season postcard.

Based on this limited evidence, I must conclude that the General Counsel has failed to meet the burden of proof required. There simply is no credible evidence that Alfredo Rodriguez was employed at the time of the strike in 1991. These two allegations will be dismissed.[14]

Maria Romero. The General Counsel has presented no evidence concerning what job Maria Romero held, if any, at the time of the strike. There are three separate documents in the record dealing with her offer to return to work. The first occurred on August 9, 1999, a union offer in which she was listed by the Union as having held a "cello" job on days, apparently meaning that she operated a cello packaging machine. A second union offer, 2 weeks later on September 22, says that she is a swing shift sorter. The third, a Diamond form also dated September 22 indicates that she would consider seasonal work. She did not give any testimony and we do not have the benefit of her recollection concerning her job, if any, at the time of the strike. Bolanos has no record of her employment. Moreover, there is no evidence that the filing of the Diamond form activated her in the HP system. That suggests that she was not in the HP system, perhaps indicating that she had not returned the 1991 season postcard, assuming that she was a seasonal employee in 1990. It may also mean that she was not a 1990 seasonal.

The General Counsel notes some testimony given by Bolanos to the effect that she may have disqualified herself from consideration in the union requests by listing both jobs and shifts. He did explain that the Company cannot honor such requests and often disqualifies applicants who make such requests. From that, the General Counsel argues that Respondent's approach to her was unreasonable. However, I note that no conditions were attached to the Diamond form and in the ordinary course of things, according to Bolanos, she should have been activated in the HP system upon its receipt. That did not occur.

[13] The original discriminatee in paragraph 11(c) was Thelma Pompa. In footnote 28 of her brief, the General Counsel moved to strike Pompa's name from this allegation. The motion is hereby granted. During the hearing the General Counsel sought to add Juana Silva, but the motion was denied. In her amendment of January 18, 2001, she successfully added Alfredo Rodriguez.

[14] On September 20, 2000, Respondent, in response to a warning given to it by the Regional Office offered Alfredo Rodriguez seasonal employment for the 2000 season. There is no further evidence concerning what happened after Rodriguez received the offer. This letter, to some extent, was part of an effort to settle the dispute. The General Counsel's argument that it, like similar letters written about that time, constitutes an admission against interest is rejected. They were the product of Regional Office exhortation, not anything else.

Unfortunately, the General Counsel made no effort during its case-in-chief to establish what job, if any, this individual held at the time of the strike. The absence of payroll or other records suggests to me that she was not employed in 1991 at the time of the strike. Accordingly, I cannot conclude that she was a striker entitled to consideration for reinstatement under the Act. This allegation will be dismissed.

Mariano Tobin. This individual has previously been determined not to have been a striker. See section b. above.

g. Paragraph 9(e)(iv); alleging that since August 13, 1999, Respondent failed to offer seasonal nonbid jobs to two[15] *unreinstated (regular) strikers.*

In this paragraph the General Counsel seeks to demonstrate that Respondent had an obligation to offer seasonal employment to regular employees who had previously offered to return to work, even though they had not made their desires known to Respondent. This theory presents a challenge to the legal principle set forth in *Rose Printing* that an employer need not offer a returning striker a job for which he or she is qualified, but only the same or a substantially equivalent job. Here there is no question, as set forth in the introductory portion of this decision, that seasonal jobs (even if the tasks are the same) are not the same or equivalent. To repeat, seasonal employees do not enjoy seniority, fringe benefits, bidding rights, year-round employment, or the substantially better income attached to regular employee status. A regular employee who has been on strike and who seeks employment beyond his or her *Laidlaw* job is entitled only to nondiscriminatory treatment. That does not mean that he or she is entitled to consideration for jobs they are not actively seeking, even if they are known to be capable of performing it. Despite the General Counsel's remonstration on the record to the contrary, this paragraph seeks to change that principle.

Maria L. Martinez Vallejo. The parties agree that Maria Vallejo was a regular employee when the strike began September 1991. For the purpose of this analysis, her actual job is of no concern. On August 13, 1999, the Union filed an offer to return for five employees, including Vallejo. On September 3, 1999, Vallejo filed a Diamond form in which she left blank the selection of whether she would consider seasonal work if offered.

It will be recalled that the Diamond form is in two parts. The top portion deals with clarifying any ambiguity which might be found in offers to return. I repeat that there are many instances in this record where the Union failed to use clear language. That was the case here. The second portion is Respondent's inquiry concerning an employee's willingness to accept seasonal work. That portion is clearly optional. An employee could choose, by circling the appropriate words, whether or not he or she would accept seasonal work. Obviously, a declination would advise the employer that the returning worker was willing to wait for his or her *Laidlaw* opening without regard for interim employment with Respondent. Similarly, an employee who said he or she was willing to consider seasonal work was saying he or she was willing to perform such work while awaiting the *Laidlaw* job. Vallejo, however, left things unclear. Her intention concerning seasonal work, whatever it was, was not transmitted to Respondent. It simply could not tell from the face of the document whether the employee wanted seasonal work or not. It knew, however, that the choices were clear: "Do" or "Do Not."

Since a signature alone could be determined to be a proper response insofar as the *Laidlaw* opening is concerned, (i.e., making the offer to return unconditional), it was reasonable for Respondent to view an answer such as Vallejo's as aimed only at the first portion, not aimed at seasonal work at all. That being the case, Respondent could legitimately conclude that Vallejo had no interest in seasonal work. If she had such an interest, she would have said so. Clearly she could also notify Respondent at any subsequent time if she changed her mind.

Despite Respondent's commonsense analysis, the General Counsel asserts "The mere submission of a signed Diamond form was sufficient to put Respondent on notice that the regular returning striker wished to be considered for seasonal work." It contends that this was the very purpose of the Diamond form. Facially, that is only one of its purposes. The argument ignores entirely the first purpose, to clarify any offer to return which might not include the word "unconditional."

I therefore find the General Counsel's argument to be unpersuasive. It does not take into account significant facts and it aims to overturn *Rose Printing* to the extent that it would impose further duties on an employer which are inconsistent with the principles announced in that case.

Meldera Gideon. Meldera Gideon presents some procedural concerns. She was first listed as a discriminatee in paragraph 9(a) as a striking regular employee who had made an unconditional offer to return in October 1998 (an apparent pleading error), but who had not filed a Diamond form. There the General Counsel listed four separate sub-theories regarding how the Act was violated. Testimony demonstrated that none of the theories was supported by the evidence and the General Counsel, by brief has moved to withdraw that allegation. The motion is hereby granted.

Gideon was also included in paragraphs 12 and 13(a). Those paragraphs, which must be read together, alleged that Gideon had made an unconditional offer to return on September 28, 1999 and that Respondent had failed to place her on a preferential recall list. Again, the evidence did not support the allegation and the General Counsel, by brief, has moved to withdraw paragraph 13, inferentially withdrawing paragraph 12 as well. The effect of that motion is to withdraw the claim that 18 named employees, including Gideon, had been discriminated

[15] In the January 18, 2001 amendment, counsel for the General Counsel included the name of Juana Silva. Silva had earlier been struck from paragraph 11 of the complaint on January 9, and again on January 10, 2001 (dealing with a 1998 incident). Her name reappeared in essentially the same theory in the January 18 motion, but now concerning itself with 1999. That motion to amend was denied on February 15, 2001, as no material fact had changed other than the passage of time. That left only one person covered by paragraph 9(e)(iv), Maria L. Martinez Vallejo. In her post-hearing brief, counsel for the General Counsel now moves to add the name of Meldera Gideon. I rule on that motion infra.

against by a failure to put their names on the preferential recall list. [16] The motion is granted as well.

However, also by motion cloaked within the text portion of her brief, the General Counsel seeks to add Gideon's name to paragraph 9(e)(iv). Because responsive briefs were permitted, Respondent was able to oppose the motion in its reply brief. As might be expected, Respondent complains that the motion is untimely, without adequate notice and that it is a continuance of the previously demonstrated inability to settle upon a theory of violation. It also argues that it is inconsistent with the withdrawal of paragraph 9(a) of the complaint. I disagree that the theories in those two paragraphs are inconsistent, but do observe that the motion to amend is untimely, coming by brief months after the end of the General Counsel's case-in-chief. The General Counsel submits that the motion should be granted, contending that Gideon's situation has been fully litigated, citing *Permagent United Sales*, 296 NLRB 333, 334 (1989), enfd., 920 F.2d 130 (2d Cir. 1990) and *Gallup, Inc.*, 334 NLRB 366 (2001).

While I have no quarrel with the Board's decisions in the above cases, I question whether the Gideon situation was fully litigated. She did not testify, leaving only Bolanos to grapple with her documentation. Furthermore, Respondent was misdirected by the complaint to defend allegations that Gideon had been denied *Laidlaw* rights as a regular employee, relating to being placed on the preferential recall list and the like. At this stage, Respondent is now forced to deal with an alternate theory, relating to her Diamond form willingness to accept seasonal work and the ambiguities placed on it by what might be her handwriting. Frankly, I am loath to accept this state of things as a fully litigated matter. See *Electrical Workers IBEW Local 1186 (Pacific Electrical)*, 264 NLRB 712 fn. 3 (1982), enfd. mem. 113 LRRM 3816 (9th Cir. 1983); *Castaways Hotel*, 284 NLRB 612 (1987); *Collateral Control Corp.*, 288 NLRB 308 (1988); *Aztec Bus Lines*, 289 NLRB 1021, 1026 (1988).

Certainly the motion was unforeseeable in the sense that no separate motion was filed before the briefs were due, and came well after I had specifically given the General Counsel multiple opportunities to amend the complaint. All in all, it is an unimpressive motion. It will be denied.

Despite that ruling, I observe on the merits, that the Gideon allegation cannot be sustained. Her union offer to return to work of September 28, 1999, was not unconditional, but she met the unconditional offer requirement by simultaneously submitting a signed Diamond form. Those are her only offers in evidence. At that point she was placed on the Excel spreadsheet. However, with respect to Respondent's inquiry concerning her willingness to be considered for seasonal work, she did not circle either the "I Do" or the "I Do Not" choices. Instead she wrote the word "forklift" [17] in the blank space above the operable line, following it with the handwritten words "regular" and "days."

Respondent could not interpret that failure to choose one of the two choices as being anything other than a nondecision concerning seasonal work. That certainly was not an acceptance of the offer to be considered for seasonal employment. Since all seasonals are obliged to affirmatively advise Respondent that they are willing to work during the next harvest, it was not unreasonable for Respondent to view this form as evidencing no willingness to work during that time. Furthermore, if one were to conclude that she did want seasonal work, she seems to have been asking for work for which she was not eligible. Seasonal forklift work, as previously noted, is a seasonal bid job available only to incumbent regular employees. She was not an incumbent. Furthermore, she asked for day shift work, which cannot be guaranteed to seasonals. For a seasonal applicant, this was a disqualifying condition.

The General Counsel's argument that Gideon, simply by filing the Diamond form, was seeking seasonal work, just doesn't fit the facts. Respondent reasonably looked at that form and determined that it only had applicability to Gideon's regular job as a *Laidlaw* returnee. The choices relating to seasonal work had been left blank and could not reasonably be interpreted to mean that the employees sought seasonal work. Her handwritten references most likely referred, not to any seasonal condition, but to her regular *Laidlaw* job. She may simply have been trying to be helpful. In any event, Respondent fairly interpreted her Diamond form as not expressing an interest in seasonal work. The allegation was without merit.

h. Paragraph 9(e)(v); alleging that since September 22, 1999, and through the 1999 season Rrespondent failed to offer nonbid seasonal work to two striking regular employees who had submitted diamond forms asserting that they would consider seasonal work.

In this paragraph, the General Counsel alleges that two regular employees, Rachel Pacheco (Peralta) and Ramlal Singh had unconditionally offered to return on September 22, 1999, but were denied seasonal work even though they filed Diamond forms saying that they would consider seasonal work if offered. Both of these individuals put conditions on their acceptance of seasonal employment.

Rachel Pacheco (Peralta). Pacheco was a regular employee employed as a production worker at the time of the strike, joining the strike when it began on September 4, 1991. On September 22, 1999, the Union sent a letter to Respondent listing seven employees, including Pacheco, saying that they wanted to return to work. Pacheco was correctly identified as a production worker. Simultaneously, the Union included signed Diamond forms for all seven. Pacheco circled the "I Do" option signifying her willingness to be considered for seasonal work. [18] On October 29, 1999 one of Respondent's callers telephoned her for seasonal employment. She declined saying

[16] Those individuals are Minnie Chavez, Maria Da Salla, Bienvenida Farinas, Hector Medina, Alfonsina Munoz, Anita Perez, Dale Sandoval, Vera Wofford, Estela Galvan, Olivia Martinez, Maria Martinez Vallejo, Gregorio Correa, Ralph Hernandez, Regina Herbert, Raul Michel, Ramlal Singh, Art Torres, and Gideon.

[17] Gideon's actual *Laidlaw* job is not entirely clear. She appears to have worked shortly before the strike in two capacities: forklift driver and production worker. It is not necessary here to determine to what job she would return. The evidence shows that no regular job covering those duties has come open since she unconditionally offered to return on September 28, 1999.

[18] She also added a phrase the stating that she also wanted regular work. Her addition of this extra language is insignificant here.

she only wanted department 05 work (sorting) or the job of tube-off operator (a bid job). The caller entered that information on the HP system and thereafter no further calls were made to her.

Bolanos explained that when Pacheco put limits on the nature of the work she would do, Respondent considered her as disqualifying herself from seasonal work. He explained (transcription errors uncorrected):

> . . . they are disqualified when they show that they only want to work in one department, one shift. And we're dealing with a lot of people, and it is difficult for us to say, okay, you know, this person only wants to work in this department. This other person only wants to work in this department. It's —we can't do it. It's—it's plantwide. If an employee gets disqualified for any job, they're scheduled accordingly by seniority, by shift preference, etcetera.
>
> They're—you just can't say I only want to work in this department of and that's it. It's not a practice—it's not a practice from us—from our—from our standpoint. It hasn't been done since I've been here, '96. It's just—it's not done. It's not doable.
>
> Q. And has that practice been followed with respect to all employees who specify limitations as to the department in which they will work?
>
> A. Yes, she is no different than anybody else.

In this circumstance, I fail to see what Respondent did which violates the Act. The General Counsel has asserted that Respondent failed to offer her seasonal work, but it did so. She chose to decline it. She also chose to ask for specific types of work, one of which was a bid job (it is unclear whether she asked for a regular bid job or seasonal bid job). If it was a regular bid, no *Laidlaw* opening had yet occurred and if it was a seasonal bid, only incumbents in regular jobs were entitled to bid for it. In any event, no bid had been posted. That job did not exist, yet that was one of two jobs she said she was willing to do. She also asked for a department 05 job, sorting. It will be recalled that there are only four nonbid seasonal jobs which can be offered: loader, general labor, production worker and case packer. It is not clear what job the caller offered her, but whatever it was it was not to her liking.

The General Counsel asserts that even if that were true, the caller should have called later for another seasonal job. I fail to see the point. First, Respondent had no legal obligation to call her at all, since these jobs were not *Laidlaw* slots. Respondent was free, therefore, to apply its normal policies to seasonal job seekers. Here the caller noted that she had declined an offered job and had said she wanted something else. Under Respondent's policies, applied to all such applicants, she had disqualified herself from seasonal employment. Such treatment is simply not discriminatory under §8(a)(3).

One further point. This call occurred in late October, at a time when the season was beginning to wind down. While the General Counsel points to Respondent's concession that at all times there were seasonal openings, it may be going too far to say that there were seasonal sorting jobs available at that late stage of the season.

This allegation will be dismissed.

Ramlal Singh. At the time of the strike Singh was a regular janitor. His name was included on the Union's list of seven transmitted to the Union on September 22, 1999, together with Pacheco. The Union also transmitted the Diamond form which he had signed that day. On that form he, too, circled the "I Do" option signifying his willingness to consider seasonal work. Next to that option he wrote "sanitation or sorting & want to be reg. work" (sic).

Bolanos testified that Singh was placed on the Excel spreadsheet, [19] but he is not certain what treatment he was given concerning seasonal work. Nor does he know how the additional writing affected Singh's being activated for the HP system call sheets. There does not appear to be any record that Singh was ever called.

Once again, Singh had no *Laidlaw* right to seasonal employment. He was only entitled to nondiscriminatory treatment. Here there is no showing what happened, only the absence of any call. Had the limits he placed on his Diamond form resulted in his being removed from consideration for seasonal work? We do know that his simultaneous colleague, Pacheco, was not called until late October. It seems likely that had his name been activated in the HP system, his name would not have been called until the same time as Pacheco, late October. We know that his preference for a sorting job probably could not be met because of the same considerations affecting Pacheco's situation—too late in the season. We also know from some documentary evidence (some bid postings GC Exhs. 75 and 76) that seasonal janitor jobs were also seasonal bid jobs. These could only be occupied by incumbents in regular jobs. Nonincumbents, such as Singh, were not eligible to bid. Therefore, if one reads Singh's Diamond form, one could easily conclude that he was limiting himself to either a seasonal bid job for which he was not eligible, or to a seasonal sorting job which did not seem to be available at that time of year. It is difficult to say with that factual background that the Company's failure to call him for seasonal work was somehow discriminatory. Certainly there is no evidence that Respondent took his status as a striker into account. At worst, all it did was to misinterpret what he had written on his Diamond form concerning his interest in seasonal work.

This kind of evidence is simply insufficient to warrant any conclusion concerning why Singh did not obtain work during the 1999 season. [20] This allegation must be regarded as unproven and will be dismissed.

i. Linda Acevedo

Linda Acevedo is a veteran employee who was originally hired by Respondent in the early 1970s. She has worked in a wide variety of jobs. Prior to the strike, Respondent, based on

[19] Bolanos did testify that Singh was not considered to be an active striker because of a 1994 unemployment proceeding. However, Bolanos also testified that his 1999 offer to return to work had resulted in his being placed on the Excel spreadsheet, the preferential recall system.

[20] If Singh had been separated from Respondent in 1994, mistakenly or not, it may be that his name could not be activated in the HP system. Yet evidence concerning that happenstance is nonexistent.

collective bargaining, had permitted its regular employees to hold three bid jobs. That meant that an employee could be, but not necessarily was, shifted among three different jobs, depending on company needs. That system changed in 1998 with the 1998 implementation. After that, regular employees could only hold one bid job. There is no contention that this change was unlawful.

In any event payroll records show, on the day of the strike, and for about 18 days before it began, Acevedo was serving as a forklift driver. She held at least one other bid position at that time, packaging machine operator, and had performed that job for least 9 days in July 1991. She gave some testimony to the effect that she was also an ESM [21] operator and/or an ESM attendant sometime earlier; yet there is no showing that she held any ESM bid job at the time of the strike. She regards ESM operator and ESM attendant as the same job. I find below that she is mistaken. However, it is undisputed that the ESM operator job as it existed in 1991 was much simpler than it is today. It has become computerized and much more complex, consolidating five or six functions previously performed by other individuals.

Acevedo agrees that her principal job as the strike began in September 1991 was as a forklift driver. There is no debate that her primary *Laidlaw* job is regular forklift operator.

The General Counsel has included Acevedo in six separate paragraphs of the complaint. Three of them concern seasonal bid jobs (two forklift postings and one ESM operator posting) and the three others concern bids for regular positions (one ESM operator slot, under two alternate theories, and one shipping dock clerk bid). Before discussing the theories, it is appropriate to review the facts concerning Acevedo's effort to become reinstated.

On September 1, 1998, she and the Union's Lucio Reyes sent a jointly signed letter to Respondent in which it may be inferred that she unconditionally sought reinstatement. On September 16, 1998, Respondent received Acevedo's signed Diamond form in which she said that she wanted to be considered for seasonal work. She testified that about 2 weeks later she received a telephone call from one of Respondent's schedulers, who offered Acevedo seasonal work as a case packer. Somewhat offended, Acevedo declined saying that if Respondent would not offer her previous bid jobs, she would stay on strike until they opened. I think it is fair to infer that she did not understand that Respondent was simply offering her some interim employment while she awaited her *Laidlaw* opening. As a result, Respondent did not call her again until sometime in May, 2000, when it offered to permit her as a regular employee the opportunity to train on the ESM operator job in its current configuration.

In the meantime, Respondent posted several jobs, some seasonal and some regular. The three seasonal job bids were: *forklift*, October 2, 1998 and August 25, 1999; *ESM operator*, November 24, 1999. The four regular job bids were: *shipping dock clerk*, April 16, 1999; *ESM operator*, late October 1998, June 25, 1999 and November 20, 1999.

[21] A type of sorting machine.

It is undisputed that Respondent did not notify Acevedo of any of these bids. The postings all occurred during the time Yvette Battles was reviewing the bids and passing information on them to Lucio Reyes. Even so, the Union did not inform Acevedo about them. Nor did she make an attempt to look for postings at the plant, believing she would be unable to pass by the guarded gates.

Although there is no debate that Acevedo's primary *Laidlaw* job was as a forklift driver, on May 12, 2000, she was offered the regular job of ESM operator. This was not a job she had actually held before, although it was a bid job and a good one. According to both Art Reyes and Hector Bolanos, in checking the company records concerning her qualifications they could only find that at one point she had served as an ESM attendant at a time when the older machines were in use. Nonetheless, Art Reyes offered her a regular ESM operator job and she agreed to take it, knowing that it was as a trainee.

Bolanos explained further:

> Q. And can you explain why this document was sent to Ms. Azevedo? (sic)
> A. The reason why this document was sent to Linda Azevedo was the NLRB [Regional Office] alleged that we had not brought this employee back to work, and to stop any potential back pay for this employee. We felt that we didn't need to, you know, offer her the ESM Operator position, but we went ahead and offered it to her.
> Q. And why was it you offered that particular position to her?
> A. That was what the NLRB alleged that we didn't bring her back to. So we offered the ESM Operator. That's the job that they alleged we should bring her back into.
> Q. And was—did the company have any records that she was qualified to work in that position?
> A. We have no records.
> Q. And so why was it you put her in the job?
> A. Two reasons. One, to stop potential liability or back pay on this employee, and [Two,] that's what the NLRB alleged that, you know, we needed to offer this employee the ESM Processing Operator position. We had no record she was ever qualified as an ESM Operator.

Acevedo testified that the job was quite different him from the one which she had had before. It required both training and study. Her testimony gives flavor to her experience:

> Q. Did you have any trouble performing that position?
> A. It was kind of difficult, because the whole process was changed. There was a lot more work, different—It was like we were doing six jobs instead of one.
> Q. But you were able to learn it.
> A. I was able to learn it because I tried to psych myself. I'd go home with notes. We went into the computer, and what I did, took notes and went into my computer and I got them into little cards to kind of help me out with my job performance . . . I went home and studied . . . I brought [in] those little cards that they have and I glued them together, and it was hard. It was very hard and difficult, but with God's help I made it.

At the time she testified in January 2001, she appears to have become both competent and confident in the job. As noted above, I am fairly certain that she had not actually been an ESM operator before, but only an ESM attendant. Yet, she obviously had had significant exposure to that type of work, even if many of the tasks had become consolidated. Apparently Respondent recognized that when it made its offer even though a significant argument could be made that the old ESM attendant job, basically a helper, and the current ESM operator job are not substantially equivalent, at least to the unsophisticated eye. In Acevedo's case, however, she believed them, at least initially, to be the same. Whether she believes that now, having been forced to master the new tasks, is a moot point. The job was offered to her as if it were substantially similar to a bid job which she had once held, she accepted that premise and is currently succeeding in performing it.

The question which the complaint allegations raise is whether she was entitled to any of the seasonal bids which arose during 1998 and 1999 and whether she was entitled either to a regular job opening such as the earlier ESM operator openings or the shipping dock clerk job. All of these allegations are encompassed in paragraphs 9(e)(vii) and (viii), 11(d), (f, alt. 1), (f, alt. 2) and (h).

Her entitlement to seasonal bid positions has been discussed above. Clearly, the simple fact that these were seasonal jobs meant that they were not substantially equivalent even though she might have been capable of performing the tasks. During her time at the plant she had become exposed to many of the jobs, apparently successfully. Still, by virtue of their being seasonal, they were not substantially equivalent and Respondent had no *Laidlaw* obligation to offer them. Similarly, because they were seasonal bid jobs, nonincumbent regular employees such as strikers, were not entitled to bid on them, at least until the bids went unfilled by a current regular employee. There has been no showing by the General Counsel that they went unfilled. Thus, even had she known about them, and had signed the bid sheet, it is highly unlikely that she would have been eligible for the seasonal bid jobs. [22] These portions of the complaint, encompassed by paragraphs 9(e)(vii), (viii), and 11(d) will be dismissed.

That leaves for consideration whether Respondent should have offered her the regular ESM job earlier (or allow her the opportunity to bid on it by notifying her of the posting) or the regular shipping dock clerk job on April 16, 1999.

I think the evidence is clear that the ESM operator job is not substantially equivalent to Acevedo's primary *Laidlaw* job as a forklift driver, or even as a packaging machine operator. It would appear that she had never performed anything like the ESM operator job around the time the strike began in September 1991. Furthermore, it seems clear that Respondent offered her the ESM operator job in May 2000, because Regional office personnel, rightly or wrongly, had concluded, for reasons not shown here, that Acevedo should have been reinstated to that job. Observing that she had had at least some exposure to the ESM process, during her time as an attendant, and further impelled by the Regional Office, Respondent decided to offer her the job to satisfy Regional Office concerns, to cut back potential liability and to see if she could fill a slot that was difficult to fill. Art Reyes knew she was a capable employee and held the potential to succeed.

That decision in May 2000, however, does not change the fact that the ESM operator job was not substantially equivalent to any job which she had held immediately prior to the strike, whether it was the forklift job or the packaging machine job. Accordingly, I find that Respondent was under no obligation to offer her the ESM operator jobs coming open in late October 1998, June 25, 1999, or November 20, 1999. Those claims are encompassed by paragraph 11(f) (alt. 1) of the complaint and will be dismissed.

The more difficult question is whether Respondent had an affirmative duty to notify Acevedo that regular job bids had been posted for which, had she known of them, she might have been able to qualify. After all, Respondent was obligated to treat her in a nondiscriminatory fashion. Specifically, paragraphs 11(f) (alt 2) and 11(h) make that type of claim. The former covers the ESM operator bids discussed above, while the latter asserts that she should have been notified of the regular shipping dock clerk bid.

Indeed, one of the skills required for the shipping dock clerk was to operate properly a forklift. That was a skill which she clearly could do, and which closely tracked her *Laidlaw* job. Shipping dock clerk did have other requirements, and may not have been substantially equivalent, given the fact that it also required knowledge of the pack code structure and such individuals worked solely in the warehouse. This was a higher level job, both in responsibility and in pay scale. While forklift operators who worked there might acquire knowledge of the pack code structure, forklift operators who worked elsewhere would not. Indeed, when this particular posting was made, it went to an individual who had previously served in that capacity on a seasonal bid basis. This job also seems to have required some computer skills, as the shipping dock clerk made entries affecting inventory control. Clearly, while there was some overlap with the forklift driver job, it required additional knowledge and skills. They were close, but not substantially equivalent. Certainly, *Laidlaw* does not obligate an employer to promote a returning striker to a better job.

In any event, substantial equivalency is not an issue in these two complaint paragraphs. The real issue is whether Respondent should have notified Acevedo about these openings. First, Respondent had no knowledge that Acevedo was even interested in those jobs, or any other job beyond her *Laidlaw* job of forklift operator. She had actually told the scheduler in August or September 1998, that she would stay on strike until her bid jobs opened, meaning certainly her forklift job and probably her packaging machine job. Having said that, the question is whether Respondent had any obligation to notify her about any other opening. I must conclude that it did not. She wanted Respondent to take her at her word. It did so, and now she cannot be heard to complain about it.

It is therefore unnecessary to further inquire about any duty which may have been imposed under *Pirelli Cable*, supra, or

[22] Had she accepted seasonal work in 1998, she might have parlayed that to a seasonal forklift job. Fellow returning striker and forklift operator Willie Smith was called for such a job on October 12.

Medite of New Mexico, supra. She had essentially told them that postings did not matter. Accordingly, these allegations, insofar as they concern Acevedo, will be dismissed.

j. Willie Smith

Willie Smith was hired in 1985, first as a forklift driver who worked during the harvest season, eventually becoming a year-round forklift driver. He worked in that capacity for 4–5 years, and was later persuaded to become an ESM operator in the belief that it offered more job security. He was an ESM operator at the time of the strike in September 1991, but probably still held a bid as a forklift operator. He hadn't been gone from the forklift job for very long. He stayed on strike, not offering to return until 1998.

On October 8, 1998, he filed both a union offer and a Diamond form indicating his willingness to perform seasonal work. As a qualified forklift driver, he was called back to work in that capacity 4 days later on October 12. While there, he observed that an ESM operator job was posted. He did not observe that it was for seasonal work but signed the sheet anyway. It did say that the job had a 2-week training period and that a test would be required. The closing date was October 20; he was laid off as a seasonal forklift driver on October 24. He was not called for the training.

Almost simultaneously with his departure, the regular ESM operator job was posted with a closing date of November 2. He had left and did not see it. About 8 months later, Respondent posted another regular ESM operator job, on June 25, 1999. On September 7, 1999, he again filed a union offer to return accompanied by a Diamond form, again advising that he would be willing to consider seasonal work. He was called to work as a forklift driver on October 14, 1999 and worked through October 22, until he was once again laid off. On November 20, 1999, another regular ESM operator job was posted. He was unaware of that posting as well.

These postings all occurred during the time that Yvette Battles was advising the union about posted bids. Apparently no one advised Smith about them.

The General Counsel asserts that Smith was entitled to be offered any or all of these ESM operator postings. Although I do not agree that he was entitled to the ESM seasonal job posted in October 1998, he was entitled to the regular one which was posted in late October and closed on November 2, 1998 [GC Exh. 58(v)]. I find he should have been offered this job as a preferential.

Respondent asserts that the ESM job as posted in 1998 and thereafter was a different job than the one he had held at the time of the strike in 1991. I have earlier touched upon that issue in the discussion above concerning Acevedo. Nonetheless, I am persuaded that the jobs were close enough that Smith should have been given the opportunity to train on the newly constituted job. He had held the job before in its simpler mode, and there was no reason to think that he should not have been given the opportunity to train for it as modified. I believe this job to have been substantially the same as his old job both as a matter of company policy and as a matter of law. [23]

The General Counsel also seeks, by a footnote in her brief, to amend paragraph 9(e)(viii) to include Smith with Acevedo and Gomez as being entitled to the November 24, 1999, seasonal bid of ESM operator. The motion is denied as moot, as he should already have been back to work as a regular ESM operator in October 1998.

k. Amanda Gomez (Sigman)

We have already discussed Amanda Gomez in a limited way. She was one of the individuals covered by paragraph 9(c) allegedly discriminated against because of a defective telephone number affecting 1998 seasonal work. As noted, she was a packaging machine operator trainee at the time the strike began, learning a new job, having previously been a regular laborer. Her first offer to return was a Diamond form dated August 28, 1998. Her *Laidlaw* job was certainly the laborer job, and quite probably the packaging machine job,[24] even though she was only a trainee when the strike began. Her training status would have simply continued had a regular packaging machine operator job opened up.

Her name appears in four other allegations, two of which involve seasonal bid jobs. These were a seasonal ESM operator job in November 1999 and seasonal packaging machine operator jobs in August 1999 and January 2000. The seasonal bid jobs are easily disposed of on the basis that they are not substantially equivalent to regular jobs. Those differences have been noted previously and will not be repeated here.

With respect to the two other jobs listed in the complaint, they were the same regular ESM operator jobs considered above in the Willie Smith discussion. There are two specific alternatives proposed here, first that at least one of the three jobs should have been offered to Gomez and second, if she was not entitled to the jobs themselves, she should have been offered the opportunity to bid on them. There is one factual matter which should be noted. Although her *Laidlaw* job was a laborer, at some point in the late 1980s, she had held the ESM operator job as it was then constituted. In 1989 she chose to sign off that bid job.

Respondent's sign-off procedure warrants some short discussion. "Signing off" is a process whereby an employee who holds a bid job may resign the job without losing his or her employment. An employee under the prestrike system could hold up to three bid jobs and under the poststrike system could hold one. If those jobs were not to the employee's liking or if circumstances required the employee to favor something else,

[23] In March 2000, Respondent did call Smith as an ESM operator trainee. He, like Acevedo, had difficulty learning the new job. He eventually signed off the new job, preferring forklift work. He said it was like performing six jobs instead of one. His 2000 experience, however, does not affect whether or not he should have been offered the job earlier. He may well have encountered the same difficulties in 1998, but that is post hoc, ergo propter hoc logic, which does not affect his right to succeed or fail in 1998. At most, it may have an impact on the backpay calculation.

[24] No regular laborer or packaging machine operator job has come open since her August 28, 1998 offer to return.

he or she was permitted to "sign off" that job. The principal consequence was that employee was unable to re-bid that job for a period of 2 years. The fact that the employee had experience performing it gave him no edge over anyone else if he decided to re-bid the job 2 years later. Under that scenario, Respondent, when dealing with returning strikers, decided that as a matter of policy a signed-off job could not be substantially equivalent, since it was the announced intention of such an individual not to perform that work. That was applied even if employee was known to be capable of performing the job or if it was one of the bid jobs held by the strikers shortly before the strike began. These instances are rare, however, and affect very few employees. Indeed it only partially affects Gomez here, since she had signed off the ESM operator job 2 years before the strike began. Respondent accepted her decision that she did not want to do ESM operator work. Moreover, as we have seen with Acevedo and Smith, the ESM operator job in its new configuration is not the same as the old ESM operator job. With that background, Respondent was well within its rights not to offer a regular ESM job to Gomez.

The General Counsel argues, as it did with Acevedo, that alternatively Respondent should have made an effort to notify Gomez of the existence of the regular ESM operator job bids in late October 1998, June 25, 1999, and November 20, 1999. First, there is no evidence that Gomez had ever expressed any interest in ESM work after signing off in 1989. Second, these occurred during the period that Yvette Battles was collecting information about bids and giving it to the Union. And, as I have noted, the Union did nothing with it, at least insofar as notifying its membership about those bids. Nor did it ask the Company for copies, knowing that the bids were being posted in a place somewhat difficult for non-active employees to access.

In the circumstances, I do not find that Respondent's adherence to its policy of posting the bids for regular jobs on its bulletin board the same fashion that it had been doing for many years, even before the strike, had a discriminatory impact on Gomez. Accordingly, paragraphs 9(e)(xi) and 11(d) alt. 2 will be dismissed insofar as Gomez is concerned.

l. Paragraph 9(e)(ix); Regina Herbert

Regina Herbert was regular forklift operator at the time of the strike. On Sept. 22, 1999, she filed a union offer to return which did not contain unconditional language. That was followed almost immediately by a Diamond form, circling the portion advising that she was willing to accept seasonal work. She also added to the end of that line "and regular work only forklift driver." It is clear from her phraseology that she was reiterating her interest in regular work and that she was a forklift driver. On October 3, 1999, a scheduler called her, apparently as a seasonal, to drive a forklift on the swing shift. She declined saying that she wanted to work days only.

The General Counsel points to a seasonal lift truck operator bid which was posted in late August, 2000, asserting that Herbert should have been offered that job outright. I concur.

Respondent's principal response is that since Herbert was a regular employee, it did not have to offer her a seasonal job since regular and seasonal jobs are not substantially equivalent. While I agree in the abstract, the facts here warrant a different conclusion. Respondent had already offered her a seasonal forklift job in 1999. She had declined it because she wanted different shift. However, in August 2000 Respondent again had seasonal lift truck operator openings on all shifts, according to the bid sheet. It obviously could have offered her forklift driving on a shift without resorting to bids. She had earlier advised that she was willing to accept seasonal work as a lift truck driver. Respondent had no reason not to consider her for the August 2000 opening, yet failed to do so, despite the fact that her shift preference could have been accommodated. As a returning striker, Herbert's preference for a seasonal forklift job had been honored in 1999; there was certainly no reason not to offer her the same accommodation 2000. Moreover, her earlier expressed preference for days may well have evaporated during the year. I find this failure to have violated §8(a)(3).

m. Paragraph 9(e)(x)

(1) Socorro Garcia

At the time of the strike Socorro Garcia was employed as a regular janitor. She filed a union offer to return in September 1998, but did not file a 1998 Diamond form. On August 9, 1999 the Union filed a list of three employees, which she was one, who wanted to return to work. This was not an unconditional offer. Yet on September 8, 1999, she did file a Diamond form, but did not specify whether she would consider seasonal work.

Although the General Counsel has not sought to file a motion to amend, she has argued in her brief that Garcia's failure to specify whether she would consider seasonal work on the Diamond form should be disregarded and that Garcia should have been considered for seasonal work anyway. It asserts, without factual support, that even if Garcia did not want seasonal work in 1998, she did in 1999 when she filed a Diamond form which in the General Counsel's view evidenced Garcia's change of mind. I am unable to accept that argument. The instructions on the form were clear. Furthermore, that form contains unconditional offer to return language which is not found in the Union's transmission. It is certainly not clear that Garcia's use of the Diamond form was intended to notify Respondent that she wanted seasonal work. If she had, it is more likely that she would have circled the "I Do" language as instructed.

To the extent that the General Counsel is sub-silentio seeking to amend the complaint in some fashion, that approach is rejected. Respondent was certainly not on notice that such an argument would be made concerning Garcia. Moreover, the evidence is nonexistent.

Turning to paragraph 9(e)(x), I note that it is directed toward seasonal janitor bid positions, one on September 16, 1999, and another on March 2, 2000. As with the other allegations concerning a nonincumbent regular employee's right to a seasonal bid, this allegation will be rejected as well. A regular incumbent is entitled to bid on a seasonal bid job, whereas nonincumbents are not. Therefore, there was no *Laidlaw* opening for Garcia on that basis. Furthermore, it was only a seasonal job and was not substantially equivalent to her regular job, for reasons discussed in detail above.

(2) Ramlal Singh

In its brief, the General Counsel renews a motion made during Respondent's case-in-chief, seeking to add the name of Ramlal Singh to this paragraph of the complaint. Singh has already been discussed above in connection with paragraph 9(e)(v) [seasonal work] and determined not to have any *Laidlaw* right to seasonal work. That conclusion covers seasonal bids as well. I had earlier denied the motion to amend on the record as being untimely and essentially part of the General Counsel's inability to settle on a theory which Respondent could defend. I continue to believe that the General Counsel's approach makes it very difficult not only to administer a hearing, but for a respondent to know what it is defending. Accordingly, I reaffirm my denial of the motion. Even so, the proffered facts would render the allegations nonmeritorious.

Paragraph 9(e)(x) will be dismissed.

n. John Gonzalez

John Gonzalez is found in paragraph 11(g) which alleges that on January 14, 1999 Respondent failed to notify him of a bid opening for packaging mechanic. The allegation is notable because it does not contend that Gonzalez was actually entitled to a packaging mechanic slot. Instead, it asserts that Respondent had an affirmative duty to notify him that the bid was up so he could bid on it if he chose.

Gonzalez was a maintenance mechanic A at the time of the strike and had been employed with Respondent since 1980. When the strike began there was no job entitled packaging mechanic. That job was created with the 1998 implemented proposal. Prior to that time, there had been five levels of mechanic, mechanic C, mechanic B, mechanic A, master mechanic and maintenance supervisor. In 1998 they eliminated levels C and B, renaming mechanic A as maintenance mechanic. They inserted packaging mechanic between the renamed maintenance mechanic [25] and maintenance supervisor, while eliminating master mechanic.

While Gonzalez had frequently performed mechanical work on packaging machines throughout his career, he was principally assigned to work on devices connected to the bleach plant. He was not considered to be qualified to perform packaging mechanic work on a bid basis. In order to do that, he needed to pass a proficiency test given to all packaging mechanic bidders. Packaging mechanic was not his *Laidlaw* job, nor was it substantially equivalent to the mechanic A job to which he had preferential recall rights.

On September 16, 1998, Gonzalez filed both a union offer to return and a Diamond form. However, he left the seasonal work option blank. The General Counsel seems to assert that he should been called for seasonal work, but that contention, if actually being made, is rejected. Had he wanted seasonal work, he would have said so. He probably did not wish to perform that work because he was fully employed as a full-time maintenance mechanic at the Lipton Cannery food processing plant, also located in Stockton, and had been so employed since 1992. He was a plant mechanic, not a laborer.

[25] Still commonly called mechanic A.

On January 14, 1999, the bid for packaging mechanic was posted. At that time Gonzalez had not yet been recalled. In September 1999 he was recalled as a maintenance mechanic, apparently on a seasonal basis although that may not have been clear to him. In October, he signed a bid sheet for a packaging mechanic job and a few days later spoke to a human resources official to find out if he had to take a test for the position. He was told he would and arrangements were made for the test. About that time he was laid off for the season. The test was scheduled shortly thereafter, but he never took it. He was upset because of the layoff, called in sick, never rescheduled and finally admitted that he was not anxious to take the test. At that time he was still working for the Lipton Cannery on a full-time basis.[26]

The General Counsel observes that the January 14, 1999 bid was filled by three maintenance mechanics who were working in the plant. She argues that Respondent should have advised Gonzalez so that he could have bid in the same fashion as the three incumbents. The fact is, however, that Gonzalez was never entitled to the packaging mechanic job in the first place. He was only entitled to nondiscriminatory treatment in any effort he made to seek a job other than as a maintenance mechanic (mechanic A). He never told Respondent that he was interested in any other job; indeed he remained a full-time employee at Lipton. If he was seeking to be employed in another capacity, at the very least one would expect that he would have made his desire known to Respondent. Again, this all occurred during the time Yvette Battles was keeping the Union informed of posted bids. Yet the Union did nothing with the bid information, not even advising strikers who wished to return about the postings. The General Counsel has not cited any caselaw which obligates a respondent to seek out strikers who might be interested in jobs other than their *Laidlaw* job, specifically promotions, except to say that they are entitled to be treated in a nondiscriminatory fashion. I fail to see how Respondent did not meet that obligation. This allegation will be dismissed. In that situation I fail to see how Respondent's posting of a higher level job than his *Laidlaw* job affected him. He wasn't qualified for it from the outset.

o. Alfonsina (Margaret) Munoz; Paragraph 11(h) of the Complaint[27]

Alfonsina Munoz, when the strike began, was a forklift operator. She had been involved in some earlier litigation as a result of her returning to work for a short time prior to a second decertification election in 1993. In 1996, because of some

[26] In April 2000, Gonzalez and Respondent's human resources department had a series of communications which resulted in Gonzalez's removal from the preferential rehire list. The General Counsel has not challenged that decision. Respondent's decision seems to have resulted from a querulous series of inconsistent responses from Gonzalez when it offered him a regular maintenance mechanic job. His responses at the very least raise the question of whether he ever intended to come back, since he had held a comparable job at Lipton since 1992.

[27] Paragraph 11(h) listed three other alleged discriminatees in addition to Munoz, Linda Acevedo, Willie Smith and Steve Bosche. Acevedo and Smith's 11(h) circumstances have been dealt with above. Counsel for the General Counsel, in footnote 34 of her brief, has moved to withdraw Bosche from the allegation. The motion is granted.

unemployment issues with another employer, Respondent characterized her as a voluntary quit and notified her of the change in her status as of May 22, 1996. This resulted in some correspondence between Respondent and the Union. As of December 1997, Respondent had not changed its view that she had terminated her employment. Those circumstances are not the subject of any unfair labor practice charge here.

On April 16, 1999, Respondent posted a regular shipping dock clerk bid, the same one discussed above with respect to Acevedo and Smith. Following its usual practice, Respondent simply posted the bid on the breezeway bulletin board.

Six months earlier, in September 1998, Munoz had filed a union application to return, but no Diamond form. In September 1999 she filed another union application to return, followed by two Diamond forms on September 3 and 28. On September 21, 1999, despite whatever status she may have held as a result of being considered a voluntary quit, Munoz was recalled as a forklift driver (through an agreement with the Union not fully disclosed here). She has worked continuously as a forklift operator from that time through at least the end of October, 2000, according to the payroll sheet received in evidence.

Paragraph 11(h) alleges that Respondent should have notified her of the April 16, 1999 bid for the shipping dock clerk job. First, it is clear that the forklift operator job and the shipping dock clerk position are not substantially equivalent. See the discussion above concerning Acevedo. If they had been, Respondent would have been obligated to have offered the job to her (or Acevedo or Smith), not simply have notified her that a bid had been posted. Thus, once again the General Counsel is seeking to impose an affirmative duty on an employer to determine what jobs a returning striker might wish to choose if his or her *Laidlaw* job has not yet come open. Certainly that is a near-impossible task if the employee has not even advised the employer that he or she wishes to be considered for some job other than their *Laidlaw* job. Again, nothing requires the employer to promote a returning striker.

Moreover, as I have noted before, this posting took place during the period when Yvette Battles was collecting information about each bid and passing it on to the Union. The Union made no effort to obtain copies of the bid itself nor did it pass on to employees whatever information Battles had supplied. Respond was only obligated to treat Munoz in a nondiscriminatory matter; I fail to see how it did not do so here since it treated her the same as it would anyone else who wanted to know about bid postings.

In addition, it is not clear on this record that Respondent had any obligation to Munoz after 1996. If she was carried as a voluntary quit at that time and her status remained unchanged despite the Union's protestation, at best she would have been an unlawfully discharged striker whose rights as such would have dissolved with the passage of the 6-month statute of limitations period established by § 10(b) of the Act. *Postal Service Marina Center*, 271 NLRB 397, 400 (1984); *Carter-Glogau Laboratories*, 280 NLRB 447 (1986); *Alaska Pulp Corp.*, 300 NLRB 232 (1990) (Sisson). Her status was certainly not reactivated in September 1999 so as to retroactively affect her status in April 1999. In that circumstance, Respondent had no obligation to her whatsoever in April. This allegation will be dismissed.

p. Paragraph 11(i); Estrella Curiel

Estrella Curiel had been hired in 1978. When the strike began she was the sanitation key operator, more commonly called a sanitation supervisor or sanitation lead. On September 1, 1998 she filed a union offer to return, followed shortly thereafter on September 9, 1998 by a Diamond form in which she indicated interest in performing seasonal work. She was called twice that season to come in as a case packer, but turned down each because of her wrist. In the 1999 season she was called again as a case packer, but turned it down for the same reason. On two of those three occasions she advised the scheduler that she preferred to return to her position as a sanitation lead. That job does not seem to have been available at that time, whether as a seasonal bid job or as a regular job.[28]

On November 19, 1999 Respondent posted an "interest list" for the seasonal job of sanitation lead.[29] Because she was not in the plant she was unaware of the request and did not sign up. On May 12, 2000, Respondent offered her a regular sanitation lead person job and she accepted. That was her *Laidlaw* job.

The General Counsel asserts that she should have been offered the November 19, 1999 seasonal sanitation lead job. Once again, I am obliged to find that the seasonal jobs, even if the skills of the same, are not substantially equivalent to the counterpart regular job. This issue has been discussed in detail above and will not be repeated here. The allegation will be dismissed.

q. Paragraph 13(b); alleging that on October 22, 1999, Respondent failed to notify two employees of bids for packaging mechanic jobs

Gregorio Correa. The General Counsel's evidence concerning Gregorio Correa is not well supported in the record. The General Counsel contends that at the time of the strike he was a mechanic A. Correa did not testify, but this assertion is supported by the testimony of union secretary-treasurer Lucio Reyes. As a master mechanic in 1991, Lucio Reyes had worked with Correa 10 years earlier and was familiar with his work. Although no company records have been supplied, Bolanos has acknowledged that Correa was a regular employee at the time of the strike. I think it is reasonable to conclude that Correa was a mechanic A, based upon Lucio Reyes's testimony.

On September 8, 1999, Correa filed a union request to return which did not contain unconditional language. On September 22, 1999, he filed a second union request, this time accompanied by a signed Diamond form in which he said he would accept seasonal work, although he appears to have confused the issues by writing the word "regular" next to the word "seasonal." The record is not clear concerning what steps, if any,

[28] On September 8, 1999, Respondent posted a bid for seasonal janitor. The job was not filled. Because it was seasonal and because of its low rate of pay, it was not was not equivalent to the sanitation lead job she had held. I find Respondent had no obligation to notify Curiel about this job, either through posting or by direct call.

[29] Unlike job bids, interest lists are for lead jobs. Although posted in the same fashion as the job bids, they are filled on a leadership basis. Seniority is not a consideration.

Respondent took concerning activating him on the HP system or placing him on the Excel spreadsheet.

In late October 1999, Respondent posted a bid for packaging mechanic. Again, this was at a time when Yvette Battles was keeping Lucio Reyes informed about bid postings, and the Union did not take steps to advise its returning strikers about them. It has therefore not tested whether Respondent would have denied Correa the opportunity to bid had he sought to enter and sign the sheet. Moreover, there is no evidence that Correa had ever advised Respondent that he was interested in work other than his *Laidlaw* job.

It is not clear that Correa was a reasonable candidate for this job, or had much likelihood of getting it even if he had known of it and signed the bid sheet. Therefore, I am not certain what to make of the allegation. Is the General Counsel contending that Correa is simply entitled to an opportunity to bid, something available to nonmechanics as well? Or is it contending that as a maintenance mechanic he had a greater likelihood of being selected and therefore should have been given some kind of greater opportunity than anyone else? Or, is it contending that since he was a maintenance mechanic Respondent had an affirmative duty to notify him of this bid? From the language of the complaint I assume it is the last.

As with other allegations of this nature, I do not find that Respondent had any duty except to treat applicants for non-*Laidlaw* jobs in a nondiscriminatory manner. Here there is no showing that Respondent did anything discriminatory or that it was part of a scheme to avoid hiring strikers. It simply followed its customary practice of posting bids in the breezeway. Surely if an individual wanted to be apprised of bids, or if the Union wanted to be certain all returning strikers had the opportunity to at least see the bids, appropriate steps would have been taken to get that information, either by asking for copies of the bids or by seeking to arrange some other means of getting access to it. This allegation will be dismissed.

Art Torres. At the time the strike began, Art Torres was a lead maintenance mechanic (supervisory mechanic) who had significant experience repairing and maintaining packaging machines. On September 28, 1999, he filed a union offer to return which did not contain unconditional language, together with a Diamond form which did. He added that he would consider seasonal work, but also wanted to be considered for regular work, specifically a maintenance mechanic slot on days. Bolanos acknowledges that it does not know if Torres's requests activated him in the HP system for seasonal work, but he knows that Torres was placed on the Excel spreadsheet.

In this allegation, the General Counsel asserts that Torres should have been notified of the October 22, 1999 packaging mechanic job bid. Here, however, it seems to me that the case has been made that the bid never should have been posted in the first place. Instead, Torres should have been offered the job, subject only to the testing requirement or his insistence upon waiting for a lead mechanic opening. That was certainly Respondent's policy as announced in the Diamond form.[30] Neither occurred; instead Respondent posted the bid.

Torres had been a lead mechanic at the time the strike began and had significant experience working with the packaging machines and supervising others who did so as well. It appears to me that he was fully qualified for this job. In essence, he had held that job at the time of the strike. Packaging machine maintenance was the lower half of his *Laidlaw* job. It is true that he also had some lead duties concerning other mechanics, but there is no doubt that he performed packaging mechanic duties on a regular basis. Since the packaging mechanic job did not exist at the time the strike, I find that it is substantially equivalent to the job which he did hold. He should have been offered the job outright.

In this instance, because matter has been fully litigated, I conclude that Respondent's failure to offer the packaging mechanic job to Torres constituted a failure to meet the *Laidlaw* duty of offering a returning strikers the right to his job when it became open. It became open when it decided in October, 1999 that such a slot was available. Torres met all of the requirements, yet Respondent failed to recognize it. This failure is a violation of Section 8(a)(3) and (1). A remedial order will be entered.

THE REMEDY

As Respondent has been found to have engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, it shall be ordered to rescind and cease giving effect to House Rule 25 or any other rule which requires management permission before an employee can distribute any printed or written material within the plant. In addition, it will be ordered to offer immediate reinstatement to the following employees (unless the employment period has ended) and make them whole for any loss of earnings and other benefits, computed on a quarterly basis (except where the backpay period is two quarters or less) from the date shown to the date of a proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987):

Name	Approximate Date Backpay Begins	Job to which employee should be reinstated
Rosa Elena Juarez	Entire 1999 season	Seasonal work
Willie Smith	Late October 1998	Regular ESM operator
Regina Herbert	Late August 2000	Seasonal lift truck operator
Art Torres	October 22, 1999	Regular packaging machine mechanic

[30] On August 7, 2000, Respondent acting at the suggestion of the Board's Regional Office offered Torres a maintenance mechanic slot and he accepted. This was not his *Laidlaw* job.

Furthermore, Respondent shall be directed to post a notice to employees advising them of their rights and describing the steps it will take to remedy the unfair labor practices which have been found.

Based upon the foregoing findings of fact, legal analysis, and the record as a whole I hereby make the following

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce and in a industry affecting commerce within the meaning of § 2(2), (6) and (7) of the Act.

2. Cannery Workers, Processors, Warehousemen & Helpers Local 601, International Brotherhood of Teamsters, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1) of the Act by maintaining a rule which requires employees to seek management permission before distributing any written or printed material.

4. Respondent violated Section 8(a)(3) and (1) when, on the dates shown above, it failed to reinstate striking employees Rosa Elena Juarez, Willie Smith, Regina Herbert and Art Torres.

5. The General Counsel has failed to prove any other allegation of the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[31]

ORDER

Respondent, Diamond Walnut Growers, Inc., Stockton, California, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Maintaining or giving effect to any rule which requires employees to seek management permission before distributing any written or printed material.

(b) Failing to recall strikers who have unconditionally requested reinstatement where their prestrike job or a substantially equivalent job has become available or where it has been established that a seasonal bid job has not been filled by an incumbent regular employee and where a former striker has expressed a willingness to accept it.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Willie Smith and Art Torres full reinstatement to their proper jobs or, if those jobs no longer exist, to a substantially equivalent position, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Rosa Elena Juarez, Willie Smith, Regina Herbert and Art Torres whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the Remedy section of the decision.

(c) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board of its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its manufacturing plant in Stockton, California copies of the attached notice marked "Appendix."[32] Copies of the notice, on forms provided by the Regional Director for Region 32 after being signed by Respondent's authorized representative, shall be posted (in both English and Spanish) by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed the facility involved in these proceedings, it shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by it at any time since October 25, 1998.

Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the remainder of complaint be dismissed.

Dated September 24, 2001

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

[31] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[32] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL NOT maintain or give effect to any rule which requires employees to seek management permission before distributing any written or printed material.

WE WILL NOT fail to recall strikers who have unconditionally requested reinstatement where their prestrike job or a substantially equivalent job has become available or where it has been established that a seasonal bid job has not been filled by an incumbent regular employee and where a former striker has expressed a willingness to accept it.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL within 14 days from the date of the Board's Order, offer Willie Smith and Art Torres full reinstatement to their proper jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Rosa Elena Juarez, Willie Smith, Regina Herbert and Art Torres whole for any loss of earnings and other benefits suffered as a result of our discrimination against them, including interest.

DIAMOND WALNUT GROWERS, INC.